JUN 1 1 1958

JOHN T. FEY, Clerk

No. 141

In the Supreme Court
of the United States

SHIPPERS' CAR SUPPLY COMMITTEE,
an Oregon Corporation,

Appellant,

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,

STATEMENT OF JURISDICTION

On appeal from the United States District Court
For the District of Oregon

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No.

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v.

INTERSTATE COMMERCE COMMISSION
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STATEMENT OF JURISDICTION

On appeal from the United States District Court
For the District of Oregon.

(a) The district court's opinion does not appear in the official reports. Copy of the opinion is appended.

(b) Jurisdictional Ground:

(i) This is an appeal from the decision of a special three-judge district court under the provisions of 28 U.S.C., section 1253.

(ii) The district court judgment is dated March 18, 1958, and was entered on that day. Notice of appeal was filed with the said district court on May 6, 1958.

(iii) 28 U.S.C., section 1253, provides jurisdiction in the following language:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

(iv) Cases sustaining jurisdiction:

Rochester Teleph. Corp. v. United States, 307 U.S. 125, 59 S. Ct. 754, 83 L. ed. 1147.
Mitchell v. United States, 313 U.S. 80, 85 L. ed. 1201.
United States v. Atchinson T. & S. F. R. Co., 234 U.S. 476, 34 S. Ct. 986, 58 L. ed. 1408.

(v) The case does not question the validity of any statute, but calls for the construction and application of certain sections of the Interstate Commerce Act, as follows:

49 U.S.C., section 1, subsections (4) and (11).
49 U.S.C., section 3 (1).

(c) Questions Presented.

The questions presented by the appeal go to the validity of the Interstate Commerce Commission order upon the single point of whether the findings entered are sufficient to sustain the order:

1. Does the order contain findings to sustain the conclusion that there was no failure to provide transportation upon reasonable request therefor, in violation of 49 U.S.C., section 1(4)?

2. Does the order contain findings to sustain the conclusion that there was no failure to furnish adequate car service within the limits of the carrier's capacity, in violation of 49 U.S.C., section 1(11)?

3. Does the order contain findings to sustain the conclusion that the complainant's members were not subjected to undue or unreasonable prejudice or disadvantage, in violation of 49 U.S.C., section 3(1)?

4. Should not the district court have found, as a matter of law, that the findings entered by the Commission required a holding that the carrier was in violation of those sections of the Interstate Commerce Act, hereinbefore referred to, and the entry of an appropriate order permanently enjoining the carrier from further violations of the Act?

(d) Statement of the Case.

Appellant filed a complaint before the Interstate Commerce Commission, naming Southern Pacific Company as defendant, and alleging violations of the foregoing sections of the Interstate Commerce Act. From the order of the Interstate Commerce Commission dismissing plaintiff's complaint, appellant sought relief by a petition filed in the United States District Court for the District of Oregon, under the provisions of 28 U.S.C., sections 1336, 1398, 2321 to 2325, 2284, and 49 U.S.C., section 17(9), naming the Interstate Commerce Commission and the United States of America as defendants, praying that the petition be heard by a special three judge district court, and that such court find the order of the Interstate Commerce Commission arbitrary, capricious and contrary to both the law and evidence of record, and that decree be entered perpetually enjoining the Commission's order and remanding the matter to the Commission for entry of a proper order.

The matter was heard by a three judge court upon certain preliminary motions filed by the defendants and by Southern Pacific Company, Intervenor, and was submitted upon the pleadings and upon the record before the Interstate Commerce Commission. Judgment was entered dismissing plaintiff's petition, the court entering its opinion that the Commission's findings of fact are supported by substantial evidence and that its conclusions from those findings are rational.

(f) Substantial questions are presented as to the validity of an Interstate Commerce Commission Order, which on the face of the order itself, and without resort to an examination of the evidence, reaches conclusions which are not only without support in the findings entered, but are contrary to most of the findings appearing in the Order. It is appellant's contention that the Commission's order amounts to a voluntary abdication of its authority to prevent abuses which are proscribed by clear statutory provisions.

(g) No interlocutory injunction was sought.

(h) Opinion of the district court, entered on January 22, 1958, is appended hereto. There were no separate findings of fact and conclusions of law.

Respectfully submitted,

WM. P. ELLIS,
Attorney for Appellant.

DEAN ELLIS,
ELLIS & ELLIS,
Of Counsel.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

SHIPPERS' CAR COMMITTEE, an Oregon corporation, COSIMA D. MacINNIS, individually, doing business as WREN PLANING MILL, and COSIMA D. MacINNIS, as Executrix of the Estate of A. L. MacINNIS, Deceased	*Plaintiffs,*	No. 8432 OPINION
vs.		
INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA	*Defendants,*	

Before: FEE, Circuit Judge, and McCOLLOCH, and EAST, District Judges

EAST—District Judge

These parties seek to review and set aside that certain order entered by the Interstate Commerce Commission (Commission) on May 26th, 1954, in the proceedings entitled Shippers' Car Supply Committee, an Oregon Corporation (Shippers) vs. Southern Pacific Co., a Corporation (S.P.) Docket No. 30708.

JURISDICTION

Jurisdiction of this Three Judge Court[1] is invoked

[1] This cause was assigned to the District Judge, William G. East of the District of Oregon for hearing upon its merits by Chief District Judge, Claude McColloch.

This three judge court, consisting of Circuit Judge James Alger Fee, Ninth Circuit, Chief District Judge Claude McColloch and District Judge William G. East, both of the District of Oregon.

under the provisions of Title 28 U.S.C., Section 1336, 1398, 2321-2325, 2284 and Section 17(9) of the Interstate Commerce Act, Title 49 U.S.C., Section 17.

PARTIES

The plaintiff, Shippers is a non-profit corporation organized under the laws of the State of Oregon to work with the railroads, railroad organizations, state and national, transportation regulatory bodies, and lumber trade organizations, avowedly to improve the freight car supply, especially in Western Oregon, and to keep its members informed concerning railroad car supply and other transportation matters.

The plaintiff, Cosima D. MacInnis, and her husband, A. L. MacInnis, now deceased, were during all times relevant to this matter co-partners engaged in carrying on a lumber business under the name and style of Wren Planing Mill (Wren). Wren was an original joint intervening plaintiff in the proceedings before the defendant Commission, prior to the institution of the above proceedings in this Court the said A. L. MacInnis, demised, and the plaintiff, Cosima D. MacInnis, appears herein individually and as executrix of the Estate of A. L. MacInnis, deceased. The plaintiff Cosima D. MacInnis, is the successor to the above co-partnership in the ownership and operation of Wren. Thru-out Wren has been engaged in the operation of a saw mill, lumber manufacturing plant and planing mill located in the Yaquina branch of S.P., in the regular course of its business marketed its products through interestate com-

merce and was at all times wholly dependent upon the S.P. and its connecting carriers for the furnishing and supplying of railroad cars and railroad service in the marketing of its lumber products in interstate commerce.

The defendants, Commission and United States of America, were named defendants pursuant to the provisions of Title 28 U.S.C., Section 2322. The intervening defendant S.P. was the defendant in the above mentioned proceedings before the Commission and is a corporation existing under and by virtue of the laws of the State of Delaware, and is a common carrier engaged in the transportation of property by railroad in the State of Oregon and other states of the union, and as such is a common carrier subject to the provisions of the Interstate Commerce Act. S.P. was permitted to intervene as a party defendant to this action by order of this Court, dated August 13th, 1956.

CONTROVERSY

On November 6th, 1950, Shippers complained to the Commission and charged S.P. with the following specific violations of law:

1. Failure to provide transportation of property upon reasonable request, particularly in failing to provide adequate trackage, motive power, and other facilities and equipment to meet the demands of the shipping public, in violation of Section 1(4) of the Interstate Commerce Act.

2. Failure to furnish adequate car service, particularly (a) in failing and neglecting to purchase or construct a supply of cars adequate for the needs of its shippers; (b) failing to effect suit-

able arrangements with connecting carriers for interchange of empty and loaded cars; and (c) Failing to employ an adequate staff of competent employees to promptly, efficiently, and fairly distribute the supply of cars available, in violation of section 1(11) of the act.

3. Causing undue and unreasonable prejudice and disadvantage to complainant's members by failure to provide car service to them in the same proportion to actual requirements as were provided to other shippers on its lines in Oregon and elsewhere, contrary to section 3(1) of the act.

4. Causing undue and unreasonable prejudice and disadvantage to shippers generally on its lines in Oregon and giving undue and unreasonable preference and advantage to other shippers on its lines in other States, in violation of Section 3(1) of the act.

5. Causing substantial increases in transportation and marketing costs, substantial losses in labor, production, and profits of complainant's members and others, by curtailing their production by preventing them from making deliveries on contracts and from selling their products in the open market, which has resulted in damage and loss of goodwill for which the defendant is liable.

Intervening Wren, claimed that the unlawful acts of S.P. prevented them from receiving an adequate supply of railroad cars and adequate railroad service from S.P. and as a result thereof have suffered damages and injuries primarily by way of loss of profits which would have been realized but for the failure and unlawful acts of S.P. aforesaid, and sought reparations from S.P. in the amount of $154,385.86. A hearing was duly

held by an examiner for the Commission who entered a proposed report to the Commission, exceptions to which were filed by plaintiffs and by S.P. Thereafter, on May 26th, 1954, the Commission, Division 2, entered its findings and order dismissing plaintiffs' respective complaints.

The plaintiffs herein insist that the said Findings and Order of Commission of May 26th, 1954, and a subsequent Order of the Commission, dated October 4th, 1954, denying reconsideration are arbitrary and capricious in that they are unsupported by substantial evidence and contrary to the evidence of the record in the proceedings before the Commission and in complete disregard of applicable law, and pray that the order of the Commission be perpetually enjoined and that the matter be remanded to the Commission to enter Findings and Order in accordance with the facts of the record and the applicable law and specifically requiring S.P. to provide plaintiffs with adequate railroad transportation service on a nondiscriminatory basis and requiring S.P. to desist from a discriminatory practice in the furnishing of railroad cars to plaintiffs. Wren further prays that the Commission be directed to award such reparation against S.P. as court shall find the plaintiff is entitled to recover under the evidence. Issue on the merits has been joined by the Commission, United States of America and S.P.

Furthermore Commission and United States of America moved the Court:

> " * * * to dismiss that part of the plaintiff's complaint relating to the claim for damages by Cosima

D. MacInnis, individually, doing business as Wren Planing Mill, and Cosima D. MacInnis as Executrix of the estate of A. L. MacInnis, deceased, for the reason that the claim is not an appropriate one for review by the three-judge district court sought to be convened pursuant to the complaint and that such Court is without jurisdiction of said part of this proceeding."

and/or to strike certain portions of plaintiffs petition.

S.P. has moved the court:

" * * * for an order dismissing the action for (1) lack of jurisdiction over the subject matter, and (2) failure to state a claim upon which relief can be granted, or in the alternative that the Court enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in defendants' favor dismissing the action, on the ground that there is no genuine issue as to any material fact and that defendants are entitled to a judgment as a matter of law."

DEFENDANT'S MOTIONS

This three judge court concludes that it is without jurisdiction to review that portion of the Commission's Findings and Order dismissing Wren's claim for damages and reparations. U.S. v. Interstate Commerce Commission, 337 U.S. 426, pp. 443.[2] Therefore the issue

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[2] '"The same one-judge trial and appeal procedure available for enforcement of an award order would appear to be an equally appropriate and adequate tribunal for adjudication of validity of a Commission order denying reparations." * * *

'"We have frequently pointed out the importance of limiting the three-judge court procedure within its expressly stated confines. We are confident that in holding that one judge rather than three should entertain cases challenging Commission reparation orders we interpret the congressional expediting procedure and the Interstate Commerce Act in accordance with their basic purpose."

"See also *Martin Bros. Box Co. v. Interstate Commerce Commission*, 128 F. Supp. 919, 921 (D.C. Ore.)"

of Wren's claim for damages and reparations should be severed and segregated from the remaining issues herein before this three judge court and the segregated issue should be submitted to the Honorable William G. East, District Judge for this District,[3] for determination.

In determining whether or not the Findings and Order of the Commission should be upheld we must look at the record made before the examiner for the Commission in the light of the facts existing prior to September 26th, 1952.[4] Therefore, that part of the plaintiff's petition and cause which seeks relief in the future, that is from and after September 26th, 1952, is moot and presents no justiciable controversy. United States v. Southern Pacific Co., 75 F. Supp. 336 (D. Ore. 1947). To the foregoing extent, the motions of the Commission and United States of America to dismiss in part and/or to strike portions of plaintiffs' petition, and the alternative motions of S.P. to dismiss or for a summary judgment before this three-judge court should be allowed, otherwise each should be denied.

ON THE MERITS

Our inquiry and office is not to weigh the evidence nor question the soundness of the reasoning "of a tribunal (Commission) appointed by law and informed by experience," but to determine if the Commission's Findings and Order lay within its statutory power and are supported by substantial evidence in the record as

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[3] See Footnote 1.

[4] Date on which Commission's examiner closed his hearing.

a whole and free from arbitrary and capricious action. Interstate Commerce Commission v. Martin Bros. Box Co., 219 F.2d 811, pp. 813 (9th Cir. 1955) Cert. denied. 350 U.S. 823, and cases cited therein.

The plaintiffs do not contend that Commission was without statutory power to make its Findings and Orders, but do insist that it was acting arbitrarily and capriciously in its ultimate determination and that said Findings and Orders are not supported by evidence. The report of the Commission is some 28 sheets in quantity, its quality is self-evident by its clear and fully documented resumé and its rational interpretation and conclusions from the evidence before it.[5]

Since the year 1946 seasonable "railroad car shortages" for use by the lumber industries in Western Oregon have been as recurrent as the "fall rains." These railroad car shortages have been the subject of recurring orders of the Commission restricting abusive uses of railroad cars by certain lumber shippers[6] and have been the subject of Congressional, Lumber Trade Associations and Railroad Associations inquiries all of

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[5] "The courts have repeatedly pointed out that whether given rates or practices are "reasonable" or "unduly prejudicial" are factual determinations confided by Congress to the judgment and discretion of the Commission. That this must be so is manifest since the sections of the Act involved contain no definition of what is reasonable or unreasonable or what constitutes undue prejudice. We quote from or summarize a few of the decisions. In Virginian Ry. Co. v. United States, supra, 272 U.S. at page 665, 47 S. Ct. at page 225, it was held: "The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.'" Interstate Commerce Commission v. Martin Brothers Box Co. 219 Fed (2) p. 813.

[6] Dougherty Lumber Co., et al v. United States, et al, 141 F. Supp. 576 (Restricting sales in transit shipments.)

which have proposed suggested remedies without satisfactory solution. To lay the blame of these car shortages at the door of S.P. by reason of improper service or inadequate equipment is beyond common knowledge and reason. The Commission's conclusion that the record fails

> " * * * to establish that the defendant failed to provide transportation upon reasonable request therefor, or failed to furnish adequate car service within the limits of its capacity, or subjected any of the complainant's members to undue or unreasonable prejudice or disadvantage, as alleged."

is a logical and rational conclusion from its Findings of Fact and therefore the Commission was not arbitrary and capricious in issuing its Orders and the same are final.[7]

The record in this case is not unlike a mirror of the facts related in Interstate Commerce v. Martin Bros. Co., *supra,* furthermore the record shows inter alia, the increasing number of cars originating and terminating by S.P. in Oregon during the years 1947-51, inclusive as follows:

"1947	479,000
1948	478,000
1949	449,000
1950	460,000
1951	507,000

"It will be noted that 47,000 more carloads were originated and terminated in 1951 than in 1950. Of these 15,635 cars consisted of lumber and forest products. The increase in volume of lumber and forest products carried was 619,400 tons.

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[7] Mississippi Valley Barge Line v. United States, 292 U.S. 282.

> "As to operation of trains, witness Winter showed an operation of 1,672 westbound freight trains in the period April to October 1950 between Eugene and Crescent Lake, whereas during the like period in 1951, defendant moved a total of 1,747 such trains over the same section of line."

There is evidence in the record that throughout the time in question S.P. was engaged in modernizing its locomotive equipment with diesels and purchasing new rolling stock. The evidence reveals that during the period of shortage of cars S.P. adopted a policy of allotting cars to the various mills on a quota or rated basis. This policy was universal for all saw mills of the Portland Division of S.P., and while unsatisfactory to the saw mill shippers it was not discriminatory against the plaintiffs.[8]

While in some phases the evidence offered by the parties before the examiner is contradictory from the documentations in the briefs of the parties and from the record as a whole, suffice, to say, the record reveals that the Commission's Findings of Fact are supported by substantial evidence and that its conclusions are rational.

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[8] "In *Midland Valley R. v. Barkley*, 276 U.S. 482, 484-485, the Supreme Court said:

" * * * The right of a shipper to cars is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The law exacts only what is reasonable from such carriers."

"The law exacts only what is reasonable from such carriers, but at the same time requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not identically. (Citing authorities.) Interstate Commerce Commission v. Martin Bros. Box Co. supra.

THEREFORE, plaintiff shippers' petition and its cause should be dismissed.

Dated this 22nd day of January, 1958.

/s/ JAMES ALGER FEE,
Circuit Judge
/s/ CLYDE MCCOLLOCH,
District Judge
/s/ WILLIAM G. EAST,
District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 141

SHIPPERS' CAR SUPPLY COMMITTEE, APPELLANT

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellees Interstate Commerce Commission and United States of America move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on March 18, 1958, by a three-judge district court convened under 28 U. S. C. 2284 and 2325, dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission dismissed a complaint seeking a cease-and-desist order and reparations based on the alleged failure of Southern Pacific Company to furnish adequate and

non-discriminatory transportation service. *Shippers Car Supply Committee* v. *Southern Pacific Co.*, 292 I. C. C. 537. Inasmuch as the Jurisdictional Statement does not contain the Commission's report, it is attached hereto as an appendix, *infra*, pp. 10–36.

In November 1950, appellant [1] filed a complaint with the Commission seeking an order directing the Southern Pacific to cease and desist from certain allegedly unlawful acts and requiring it to provide appellant's members on its rail lines in western Oregon with adequate and non-discriminatory services and facilities. In substance, the complaint alleged that Southern Pacific had violated its duty (1) to furnish adequate car service within the limits of its capacity as provided by section 1 (11) of the Interstate Commerce Act (49 U. S. C. 1 (11)); (2) to provide transportation upon reasonable request as required by section 1 (4) of the Act (49 U. S. C. 1 (4)); and (3) not to subject shippers to undue or unreasonable prejudice or disadvantage as prohibited by section 3 (1) of the Act (49 U. S. C. 3 (1)).

After extensive hearings, the Commission issued its report (App. A, *infra*, p. 10) in which it held that

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[1] The Commissioner of Public Utilities of Oregon and Wren Planing Mill, a partnership, intervened in support of the complainant. The latter, in addition to general relief, sought an award of damages, which claim was denied by the Commission. This claim for damages was eliminated from the three judge proceeding and referred to a single district judge for determination (J. St. 10–11). The Oregon Commissioner did not seek court review.

the record did not establish that Southern Pacific "failed to provide transportation upon reasonable request therefor, or failed to furnish adequate car service within the limits of its capacity, or subjected any of the complainant's members to undue or unreasonable prejudice or disadvantage." (App., *infra*, p. 36). These ultimate findings rested on the following subsidiary findings, among others: That the freight car supply situation in western Oregon cannot be viewed in isolation but only as part of national transportation conditions; that the anticipation of transportation needs involves predictions of future economic trends; that prior to World War II Southern Pacific had large freight car surpluses, and afterwards car shortages at times; that Southern Pacific had taken many steps to improve and expand its transportation facilities, both systemwide and in Oregon; that car service orders had required Southern Pacific to deliver a certain number of empty cars to some of its connecting lines; and that changing economic conditions and other special circumstances complicated the rendering of transportation service by Southern Pacific in western Oregon. The Commission accordingly dismissed the complaint.

The district court unanimously sustained the Commission's order. The court held that "the record as a whole * * * reveals that the Commission's Findings

of Fact are supported by substantial evidence and that its conclusions are rational" (J. St. 14).[2]

ARGUMENT

Appellant's only contention (J. St. 2–3) is that the Commission's report is defective because of a lack of sufficient findings to support the conclusions reached therein. Appellant cites no cases to support its contention, which is phrased in most general terms without any indication of specific defects. Since no issue concerning the evidence adduced before the Commission is presented, the facts as stated in the report of the Commission must be accepted as true. *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286.

It is settled that the Commission need not make detailed findings of fact in non-damage cases, so long as the "essential basis of its judgment is sufficiently disclosed in its report." *Alabama Great Southern Railroad Co.* v. *United States,* 340 U. S. 216, 228. Nor is it necessary for the Commission to make a

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[2] Prior to the hearing before the district court, intervening defendant Southern Pacific filed motions to dismiss or for summary judgment, primarily on the ground that the case was moot. The parties did not brief the issues on the merits. At the hearing before the district court, on September 10, 1956, the argument dealt with mootness, although the parties did touch on the merits. Sixteen months later, the district court filed its opinion in which it granted in part the motions to dismiss for mootness, and also affirmed the Commission's order on the merits. Appellant filed no petition for rehearing challenging the court's action in deciding the entire case, and it does not raise the issue here. Its sole contention (J. St. 2–4) is that the Commission's findings do not support its order.

rigid set of subsidiary findings, since they "will vary with the statutory authority invoked and the context of the situation presented." *Ibid.* As already indicated (Statement pp. 2–3, *supra*), the ultimate findings follow closely the language of the statutes involved. The subsidiary findings adequately support the conclusions reached. Moreover, these findings represent the judgment of the Commission based upon the facts adduced at the hearings and interpreted in the light of its expert knowledge of the field of transportation.

First, appellant questions the findings concerning section 1 (4) of the Interstate Commerce Act (49 U. S. C. 1 (4)), which requires railroads to "furnish transportation upon reasonable request therefor," and section 1 (11) which compels "adequate car service." It is clear that a carrier's failure to furnish cars upon request of a shipper is not necessarily a breach of the carrier's obligation to the shipper, for the test is one of reasonableness under the particular circumstances involved. *Pennsylvania R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 133; and *Midland Valley R. Co.* v. *Barkley*, 276 U. S. 482, 484–485. In concluding that no violation of these sections had been shown, the Commission found that Southern Pacific experienced periods of freight car surpluses and shortages due to various factors; and that it augmented its rolling stock and improved its physical plant with reasonable alacrity under the circumstances. The following excerpts from the Commis-

sion's report adequately support the conclusion reached.

> * * * Large surpluses of empty cars occurred in the period 1924 to late 1940. * * * That period was followed by an upsurge in traffic volume as a result of World War II, during which the defendant had difficulty in disposing of cars made empty on its lines. With the end of the war, the situation suddenly changed and there was a car shortage until a decline in industrial production and in railroad traffic occurred in 1949. Shortly thereafter there followed an upsurge in traffic caused by the Korean conflict, so that the national traffic situation changed from a reported car surplus of some 35,000 to one of car shortages that became widespread and severe in many parts of the country, particularly in western Oregon. * * * [App., *infra*, pp. 32–33.]
>
> During World War II the purchase of cars, locomotives, and many other materials were restricted by priorities. In the period 1940 to 1951 the defendant purchased 48,813 freight cars and 725 locomotives. * * * Since 1946 the defendant has purchased some 30,680 cars, at a cost of approximately $380,000,000, and contributed some $79,000,000 for the purchase of refrigerator cars for the Pacific Fruit Express, in which the defendant has a half interest. Delays were experienced in the delivery of some of the equipment. Bad-order cars have been repaired with diligence. * * * [App., p. 34].
>
> * * * In recent years the defendant has substantially increased its fleet of diesel locomotives and switchers, completed new retarder

> yards at Roseville and Los Angeles, Calif., increased its traffic density and freight-train speed, installed centralized traffic control on several portions of its lines in California, and planned such control on the lines between Crescent Lake and Klamath Falls. * * * [App., p. 31.]

Secondly, appellant challenges the finding that its members were not shown to have been subjected by Southern Pacific to undue or unreasonable prejudice or disadvantage. Clearly, section 3 (1) of the Act does not proscribe all differences of treatment, but only those preferences or prejudices that are undue or unreasonable. The conclusion that appellant's members were not subjected to illegal discrimination is based on findings that car shortages in western Oregon were a reflection of a nationwide situation, often aggravated by factors peculiar to the area. Again, the Commission's report adequately supports its conclusion.

> * * * While the defendant has not furnished all the cars desired by Oregon lumber shippers during the peak season in summer months, on an annual basis the cars furnished have approximated, and in some instances exceeded, those ordered by the shippers. * * *
>
> * * * As stated, the car shortages in the periods complained of were largely national of scope, and there is no convincing evidence that, on the whole, the complainant's members did not fare as well in the car service accorded them as did shippers generally in car-shortage areas elsewhere. * * * [App. pp. 35–36.]

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> * * * With the Cascade line in service, western Oregon is now given about 11 times more train service than in 1926. Carloads originating on the defendant's lines in Oregon have increased 170 percent, and tons originated have increased 200 percent, 1951 over 1926. * * * [App., *infra.*, p. 32.]
>
> There are not enough cars made empty in Oregon nor in California, north of San Francisco, to satisfy demands for empty cars for loading in those areas. It is thus necessary for the defendant to move empty cars from the area around Los Angeles and from as far distant as Texas and Louisiana. A number of cars are received from the defendant's connections at Ogden, Utah. The necessity of bringing empties from such distant areas and over routes with such difficult operating conditions as that via Tehachapi, Calif., increases the hazards likely to restrict or stop the flow of cars to the Oregon territory. [App., *infra*, p. 31.]
>
> As a contributing factor to the defendant's difficulty in furnishing cars to its shippers during this period, the Association of American Railroads issued several car service orders or directives requiring the defendant to turn over to its connecting lines specified numbers of serviceable cars as described in the orders. * * * [App. *infra*, p. 33.]

We submit that the findings quoted above provide a wholly adequate basis for the Commission's conclusion that Southern Pacific violated no duty owed to appellant. "[T]he report, read as a whole, sufficiently expresses the conclusion of the Commission * * *." *United States* v. *Louisiana*, 290 U. S. 70, 80.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the District Court should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

ROBERT W. GINNANE,
General Counsel.

CARROLL T. PRINCE, JR.,
Attorney,
Interstate Commerce Commission.

JULY 1958.

APPENDIX

INTERSTATE COMMERCE COMMISSION

No. 30708

SHIPPERS CAR SUPPLY COMMITTEE[1] *v.* SOUTHERN PACIFIC COMPANY

Submitted February 11, 1954. Decided May 26, 1954

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS ALLDREDGE, ARPAIA, AND FREAS

BY DIVISION 2:

Exceptions to the report proposed by the examiner, and replies thereto, were filed by the parties. We have heard the parties in oral argument. Exceptions and requested findings not discussed herein nor reflected in our findings or conclusions have been considered and found not justified.

By complaint filed on November 6, 1950, the complainant charges the defendant with the following specific violations of law:

> 1. Failure to provide transportation of property upon reasonable request, particularly in failing to provide adequate trackage, motive power, and other facilities and equipment to meet the demands of the shipping public, in violation of section 1 (4) of the Interstate Commerce Act.

[1] Complainant is a nonprofit corporation of Oregon dedicated to the purpose of improving the freight car supply and the quality of railroad service, especially in western Oregon.

2. Failure to furnish adequate car service, particularly (*a*) in failing and neglecting to purchase or construct a supply of cars adequate for the needs of its shippers; (*b*) failing to effect suitable arrangements with connecting carriers for interchange of empty and loaded cars; and (*c*) failing to employ an adequate staff of competent employees to promptly, efficiently, and fairly distribute the supply of cars available, in violation of section 1 (11) of the act.

3. Causing undue and unreasonable prejudice and disadvantage to complainant's members by failure to provide car service to them in the same proportion to actual requirements as were provided to other shippers on its lines in Oregon and elsewhere, contrary to section 3 (1) of the act.

4. Causing undue and unreasonable prejudice and disadvantage to shippers generally on its lines in Oregon and giving undue and unreasonable preference and advantage to other shippers on its lines in other States, in violation of section 3 (1) of the act.

5. Causing substantial increases in transportation and marketing costs, substantial losses in labor, production, and profits of complainant's members and others, by curtailing their production by preventing them from making deliveries on contracts and from selling their products in the open market, which has resulted in damage and loss of goodwill for which the defendant is liable.

The complainant seeks an order directing the defendant to cease and desist from the unlawful acts alleged, and requiring it to provide the complainant's members and other shippers on the defendant's lines in western Oregon with adequate and nondiscriminatory service and facilities, and to pay to the complainant's members such damages as may be claimed

and established by them, with reasonable counsel fees.

The Commissioner of Public Utilities of Oregon intervened generally in support of the complainant. A. L. MacInnis and Cosima D. MacInnis, doing business as Wren Planing Mill, intervened in support of the complainant and, in addition to a prayer for general relief, seek an award of damages.

The defendant answered, challenging the sufficiency of the complaint and alleging that there is a defect of parties defendant in that connecting lines are necessary parties with respect to the matters alleged. Concurrently with the filing of its answer, the defendant made a motion to dismiss the complaint and, alternatively, to make the same more definite and certain. This motion was overruled on February 8, 1951, but without prejudice to the defendant's requesting, at the close of the complainant's testimony, a further hearing for the introduction of evidence respecting those allegations of the complaint which the defendant claimed are indefinite and uncertain. Such a further hearing was held.

The chairman of the complainant committee has been engaged in the wholesale lumber business as the Trio Lumber Company at Eugene, Oreg., for more than 25 years. He owns an interest in the Douglas Manufacturing Company, a sawmill and remanufacturing plant near Roseburg, Oreg., with an output of 90,000 feet per day, and in the Ada Company, of Ada, Oreg., producing 25,000 to 30,000 feet per day. The market for his lumber generally, and that of other shippers who testified of record, is practically throughout the United States. The practice of billing is not uniform. Sometimes the company is shown as the shipper, sometimes the mill, and in some instances the purchaser of the lumber is named as the shipper. The inability to obtain cars when desired

caused the chairman of the complainant in 1946 to investigate the causes for the lack of cars for Oregon lumber shippers. He contacted the western representative of the Association of American Railroads in Seattle, Wash., and described the situation, but without results. Thereafter, following the car shortage of 1947, he and two other firms, by letters, requested an investigation by this Commission of the lack of car service to western Oregon lumber shippers, but apparently no relief was obtained. In 1948, he was appointed chairman of a traffic committee for the Western Forest Industries Association. The purpose of the association was to make an investigation among shippers with a view to remedying the situation caused by the car shortage. During the investigation, it was determined that an organization devoted solely to investigating the car supply should be formed, and the complainant committee was created for the purpose.

The car shortage at Eugene was serious during the summer months of 1946 and for subsequent summer seasons, including 1950 and some of 1951. During these months of heavy demand, a customer could not be advised when a shipment would be made because of the lack of cars. This condition affected western Oregon lumber shippers, particularly those located on the lines of the defendant, to such an extent that they lost the so-called "premium business," that is, business commanding premium prices for quick shipments. The inability to get cars when needed caused the mills to take orders for short periods instead of a normal 30-day order supply. The car shortages of 1946 and 1947 caused purchasers to operate in much the same manner. This eventually led to the practice of the so-called transit sales. Although not satisfactory either to the producer or the buyer of the lumber, 50

percent or more of the volume shipped from western Oregon was forced into this practice because of inability to arrange for the shipment of a carload when needed.

In 1950 the chairman of the committee went into the State of Washington to obtain cars to be stopped off for completion of loading in Oregon. This caused extra expense and delay. Shippers could obtain cars from railroads in Washington, put a small amount of lumber therein, and route them through Oregon to complete loading. The routing of such cars generally was "UP–SP–UP." For a time no definite amount of lumber had to be loaded to obtain the use of a car. Later, 25 percent of the carload minimum weight was required. That requirement was hard to meet because of the difficulty and cost of obtaining the quantity and quality of lumber desired. This caused the wasteful use of cars and afforded slight relief. In some instances lumber was hauled by truck as much as 200 miles from origins (local to the defendant) to Portland, Oreg., for partial loading, and some cars were fully loaded from the trucks in Portland.

The failure to get cars when needed caused many mills to shut down during the summer months of 1946–50. The situation was particularly bad in 1949 and 1950. When the lumber could not be shipped substantially as produced, storage costs became prohibitive. Shipping members of the complainant at Grants Pass, Oreg. (local to the defendant), experienced severe car shortages during the summer of 1947–50. One of the complainant's members operates a custom milling business and molding plant at Grants Pass with a daily capacity of 8 cars. During the car-shortage periods of 1949–50, he received as low as 1 car or 2 cars per day. The mill had storage for some 5,000,000 feet of lumber, but when that much lumber

accrued the plant had to stop work, thus causing a shutdown of all supplying mills. Handling and storing large quantities of lumber resulted in extraordinary inconvenience and expense, and the cost of such operations could not be added to the price of the lumber or millwork. Shippers generally, and particularly those at Grants Pass, complained of poor service, such as switching, time changes in switching, and the manner of handling orders for cars. Some 15 other witnesses representing lumber shippers who operated from 1 mill to 5 mills and produced large quantities of lumber for shipment by rail, most of whom were dependent for cars upon the defendant, testified to the same effect.

Witnesses for feed and seed dealers in Oregon, located on the defendant's lines at such points as Cornelius, Gladstone, and Roy, described as serious to them the car shortages of 1946 and 1947. Their greatest losses caused by lack of cars were during the summer months of those years. Some of their plants are located also on the lines of the Spokane, Portland and Seattle Railway Company, and some on the lines of both the defendant and the Oregon Electric Railway Company. At most of the times they were able to obtain cars as needed at the competitive points. The bad effects of the 1950 car shortage was reduced by trucking their grain to Portland. The 1951 crop was about 10 percent of the normal volume, so that little of it was offered for shipment in that year.

Witnesses for lumber interests of Grants Pass testitified at the adjourned hearing as to conditions existing during the summer months of 1952. Operations of the Engler-Hudson Company, located some four city blocks from the defendant's station, were described. This company operated 2 shifts daily and produced some 250,000 feet per day. The capacity

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of the plant was rated as 8 cars per day. On 6 of the first 10 business days of July, orders were not filled, although presumably there was no car shortage elsewhere on the defendant's line at that time. On July 11, six cars were furnished. A shortage of cars was experienced every other working day in July (1952), except 2. The record for the month was 113 cars ordered and 82 furnished, a shortage of 31. For August, on 7 working days, the company received no cars, but had orders for an average of 8 for each day. The record for August was 184 cars ordered and 83 furnished, a shortage of 101. On and between September 1 and 19, 1952, 72 cars were ordered and 56 were furnished.

The complainant employed a special representative with some 30 years' experience in traffic matters in this origin territory. He visited practically all communities in the territory, attended many meetings looking to the improvement of car supply, and worked closely with members of the complainant and lumber shippers in western Oregon during the car shortage of 1950. He found a large quantity of lumber being loaded from trucks into cars at Portland during the summer of 1950, which had been trucked from points local to the defendant's lines, some of them as far distant as Coos Bay, Oreg. Apparently the cars were furnished by carriers other than the defendant, although some were loaded from trucks at Park Street and at East Portland on tracks operated by the defendant and the Union Pacific Railroad Company.

It is urged by the complainant that the trackage and other facilities of the defendant was not adequate to meet the transportation needs of the area in western Oregon served only by its lines. It charges the defendant's management with failure to recognize

important changes that have occurred in the lumber industry. During the last 15 to 20 years, the transition of the industry from western Washington to western Oregon has been marked, especially in recent years. Lumber shipments from Oregon originating on the lines of the defendant have increased by some 92,000 carloads, 1950 over 1938, or by 65.92 percent. In 1925, Washington produced almost twice as much lumber as that produced in Oregon; today the reverse is true.

Witnesses expert in the lumber business in Oregon expressed the opinion that production will continue to increase for many more years; that the yard tracks at Eugene are sometimes "jammed;" and that Roseburg is short of adequate storage tracks. It is practically conceded that the Brooklyn yard facilities at Portland have been so taxed at times as to cause serious delays. The complainant emphasizes that carrier facilities designed for conditions of 1930 do not meet the needs of the Oregon Lumber industry as it exists today.

This proceeding, although instituted by complaint, developed into a general investigation. Considerable evidence of record was obtained by employees of the Commissioner of Public Utilities of Oregon, intervener. These employee witnesses cooperated with the complainant and its counsel. It was not possible for the personnel of the intervener to survey traffic conditions on all lines of the defendant in Oregon, but efforts were concentrated on certain portions which seemed to constitute "bottlenecks." The Oakridge-Crescent Lake portion was characterized as "the cork in the bottle," and as having reached a saturation point in 1950.

Train sheets were checked for records of performance at Eugene, Portland, and Albany, Oreg. The

testimony related principally to the operation of trains between Eugene and Crescent Lake and between Ashland, Oreg., and Black Butte, Calif. Operation over the mountains is considered a factor materially affecting the ability of the defendant to get empty cars into western Oregon, sometimes referred to as the valley, and loaded cars out. From his studies a witness for the intervener concluded that there is more traffic available on the defendant's lines in western Oregon than it is feasible to handle in existing operations over the Oakridge-Crescent Lake tracks. He strongly urged the use of the Portland gateway, and expressed the opinion that relief could come from an order by this Commission requiring the Oregon Electric and the defendant to interchange cars at such points as Albany or Eugene for loading at points as far south as Drain, Oreg., at the one-factor joint rates applicable over other routes. The record indicates, however, that the defendant could handle more traffic between Eugene and Portland, and the one-factor joint rates to the East are now applicable over that line via Portland. The witness suggested also that lumber shippers would be benefited, and the handling of Oregon lumber traffic could be facilitated, by enlarging the defendant's yards at Eugene, and by installing central traffic control and lengthening the passing tracks on the Eugene-Crescent Lake line.

In a number of instances cars furnished Oregon lumber shippers were undesirable for intended shipments. One shipper was given 44 undesirable cars out of 98 furnished in the month of July 1950; another was compelled to load cattle, refrigerator, and gondola cars; another had to accept cars littered with debris from previous shipments; and others were furnished automobile cars limited to California desti-

nations where the market was not always desirable.

The total number of carloads originated by the defendant in 1950 exceeded the number originated in 1940 by 327,000, an increase of 36.5 percent. During this period the number of cars owned by the defendant increased by 15,389, an increase of 41.2 percent, as compared with an increase of 4.7 percent for all class I railroads in the country. It is claimed, however, that this does not portray adequately the car-supply situation as it affects Oregon lumber. The defendant is said to have depended for many years for its car supply upon cars furnished by other lines. At numerous times during earlier years the number of cars on the defendant's line has been between 180 and 194 percent of the number owned by it, whereas in more recent years, 1949 for example, the average was only 128 percent. The general superintendent of transportation of the defendant testified that the general adoption of the 5-day week has decreased the utility of freight cars to such an extent that it has displaced an estimated 5,197 of defendant's car supply. Using that figure, instead of an increase of 41 percent in car ownership in the last 10 years, the effective increase was only 27 percent. Another influence upon the defendant's car supply is the fact that the average length of haul of lumber products originating in Oregon has increased from 1,293 miles in 1940 to 1,598 miles in 1949 and 1,718 miles in 1951.

The use by the defendant of its 1940 ownership as a base of comparison is criticized because the ownership in that year is said to have been the lowest for a long period of years, having been only 85 percent of the 1937 ownership. This is largely the reason, according to the complainant, that during the war years 1941–45 the defendant had little more than half enough cars to meet its traffic requirements. The

complainant insists that the defendant was short some 19,000 cars in 1940. Attention is called to the defendant's evidence that the number of cars owned or leased in 1951 was 147.7 percent of that in 1940, and that with the improvement made in car equipment it could, in 1951, transport 155.6 percent of the 1940 tonnage. In the same period carloads of revenue freight originated increased 143 percent, and the number of tons increased 158 percent. The lumber and grain shippers here complaining, however, are interested principally in boxcars. The increase 1951 over 1940 in that class of equipment was 145.1 percent in number and 146.6 percent in carrying capacity. Forest products (excluding logs) originated by the defendant in Oregon during that period increased 183 percent in carloads and 209 percent in tons. It is claimed that some 7,700 more boxcars than were acquired by the defendant were needed for the increase in this traffic, and that 12,000 additional boxcars would have been required to keep pace with the 204-percent increase in the production of Douglas fir lumber in Oregon during the same period. This apparently assumes that the defendant would have transported all of this traffic, whereas some of it moved by water and some by motor carrier.

In 1950, some 82.5 percent of the defendant's traffic originated in Oregon consisted of forest products. Comparisons were made of revenue ton-miles and traffic originated per mile of road on lines of the defendant with national averages. On the revenue ton-mile showing, the complainant claims that the defendant was short in car ownership by several thousand cars. As to traffic originated per mile of line, the national average in 1950 was 145 cars in contrast with 150 for the defendant's system lines, and 215 on its Oregon lines.

Shortage in adequate car ownership by the defendant, under fair and equitable distribution, would affect its ability to serve shippers over its entire system. A witness for the Oregon commissioner testified that the car shortage on the Portland division was acute from the week ended May 15 until the second week of November 1950. Weekly shortages after that first week exceeded 1,000 cars, averaging 2,864 cars during July, and reaching a high of 5,562 in late August. Somewhat comparable figures were presented by the general superintendent of transportation for the defendant. They show that an average shortage of some 1,352 cars existed on the Portland division. These data indicate that a severe shortage of cars was experienced on the Portland division some weeks before any shortage was indicated for the rest of the system. No overall system shortage is shown until the week ended June 17, 1950. The system shortage for that week appears as 831 cars, whereas the shortage for the Portland division is given as 1,497 cars. According to the complainant, the weekly average shortage on the Portland division was from two to three times that shown for the system. For example, for the weeks ended July 15, 22, and 29 a net system surplus of 303, 421, and 95 cars appears, whereas the complainant indicates there was a shortage on the Portland division of 2,091, 2,793, and 2,284 cars, respectively.

The complainant asserts that the inadequate car supply was so distributed as to discriminate unjustly against the lumber shippers of western Oregon. An important factor in this respect is said to be the manner in which the cars available were allotted to the several western Oregon mills. Mills were given ratings by an official of the defendant at Portland. The so-called agents' 50 report was placed in use on the

Portland division at the beginning of the car shortage in 1950. At first it was compiled from information supplied by the defendant's agents. The official who prepared the agents' 50 report was subpenaed by the complainant. His testimony indicates that some of the mills were rated according to their cutting capacity, using 30,000 feet as a carload, and others were rated on their ability to load a given number of cars in an 8-hour period. The only reason he could give for this variance was that the information was furnished by the agents, and that some mills apparently were loading lumber which they did not cut. In 1951 the report was compiled on the basis of information furnished directly from the millowners. Changes in the agents' reports were made at various times as errors were discovered or as new information was received. The Oregon commissioner issued an order, effective on September 25, 1950, requiring the defendant to keep and preserve uniform records of all orders for cars, the orders to be written or confirmed in writing. That order was superseded by another which became effective on September 4, 1952, and the latter was superseded by another, effective on June 27, 1953. The last order provides that car ratings for shippers of lumber shall be based on prior loading performance of each shipper, determined from a fair average of the highest loadings in 3 months of each of the 2 preceding calendar years, giving due consideration to new or changed facilities and present or anticipated shipments by water or motor carrier.

The complainant charges the defendant with unlawful acts in connection with car service, or the lack of it, in western Oregon which caused lumber shippers to suffer increases in transportation and marketing costs from curtailment in production that prevented deliveries on sale contracts for lumber and on sales in

the open market, all resulting in damage and loss of goodwill, for which the complainant alleges the defendant is liable. These allegations were made in the complaint for the benefit of any lumber shipper, member of the complainant committee, who might desire redress through an award of reparation. Only one, the partnership doing business as Wren Planing Mill, has asked reparation in this proceeding. Violation of sections 1 (4), 1 (11), and 3 (1) are specifically alleged by this complaint, and damages under sections 8 and 9 of the act are sought for the period June 1 to October 1, 1950. It is charged that during that period the defendant failed to furnish this shipper a reasonable car supply, and that it unlawfully discriminated against this shipper in that it failed to make an equitable distribution of the cars available on the Portland division. This claim is based principally on the alleged failure of the defendant to establish and enforce an equitable car distribution rule during this period of car shortage, said to be due largely to inconsistencies and variances in keeping records of cars ordered and supplied to this and other shippers.

Most Oregon lumber mills, including Wren, are dependent upon the defendant for an adequate car supply to keep their mills in operation. Storage facilities are limited. Without cars the storage space soon is filled and slowdown or shutdown in operation is forced. The claim is that the defendant, by failure to supply cars, prevented Wren from producing lumber which otherwise it could have produced and sold. Wren testified that there was no stoppage of work at its mill during the period June 1 to October 1, 1950, except for that made necessary by lack of cars. There was no recorded sawmill production for a period of 10 days from August 18 to August 29, 1950.

However, during that time the defendant furnished Wren two cars, one on August 23 and one on August 24. On August 14 Wren ordered 6 cars for placement on August 18; on August 19, 6 cars were ordered for placement on August 21; and on August 24, 18 cars were ordered, 6 for each day of August 25, 26, and 28. This total of 30 cars ordered for delivery during the 10-day period shows, according to the complainant, that the shutdown was due solely to the lack of cars.

Reference is made to reports of the Commission in which it has discussed methods for distribution of cars in periods of car shortages. In *Tanner & Co.* v. *Chicago, B. & Q. R. Co.*, 53 I. C. C. 401, 406, it is said:

> Thus, it is a common practice of carriers in periods of car shortage to distribute coal cars in accordance with mine ratings, determined by the volume of past shipments; but coal is shipped as mined and the amount that may be considered ready for shipment is the amount that can be mined, loaded, and forwarded from day to day. The best evidence of mine capacity is the volume of shipments during normal periods, * * *.

Lumber produced at mills in western Oregon must be shipped largely as it is produced. The complainant stresses the fact that rating such a mill for cars based on production, as indicated in the quotation above, is not a proper measure because car shortages have existed in western Oregon during summer months since 1946, and ratings based on prior production would necessarily carry into effect the consequences of prior car shortages and serve to protect the defendant in its failure to furnish cars in subsequent periods of car shortage. Because of this, the complainant asserts that there has not been a

period of normal movement of lumber from this origin territory that would show the true capacity of the lumber mills or the true market demand. It is argued, therefore, that the rules established in cases determining quotas for the movement of wheat or coal would not be equitable if applied to western Oregon lumber. It is argued also that the consideration of damages suffered by Wren during the summer months of 1950 should not be limited to lumber on hand, nor to shipments made in prior years, as a basis for capacity, for the reason that prior operations and shipments are only as accurate a measure of Wren's capacity as the defendant's furnishing of cars in any period was equitable and complete. There being no period of equitable or complete car service for Wren, rules for distribution stated in prior reports of this Commission, it is urged, should not be considered as controlling here.

Rating for mills in the so-called agents' 50 reports gave Wren 4 cars on a stated production of 135,000 feet. This production figure is said to have been furnished the defendant by one of the partners of Wren. The rating later was raised to 5 cars, but the record is indefinite as to why such an increase was made. Wren claims that it was at the time producing more lumber; that it was and is shown in reliable publications relating to the Oregon lumber industry as having a capacity of 140,000 feet for its resaw mill and 200,000 feet for the planing mill; and that the proper official of the defendant was advised of this capacity, which would warrant a quota or rating of 7 cars a day, but that the carrier-official could not remember having received such advice from Wren. Notwithstanding that reliable information was published by the defendant's freight traffic manager and in Crow's Buyers and Sellers Guides, such publica-

tions were not consulted nor used in making ratings for Wren or other mills on the Toledo branch of the defendant. At no time during the period covered by this report was Wren given a rating of more than 5 cars.

Reference is made to *Martin Bros. Box Co.* v. *Southern Pac. Co.*, 280 I. C. C. 395,[2] wherein division 3 dismissed a complaint against the defendant here which sought damages from losses of profit and goodwill due to alleged failure during the first 9 months of 1947, at the plant of the complainant at Oakland, Oreg., safe and adequate car service which it was claimed subjected the complainant to undue or unreasonable prejudice and disadvantage. Complainant argued that the instant record is more complete than that in the foregoing proceeding.

Wren asks an award of damages in the amount of $154,385.86. This total is made up of (1) loss of profits, $144,510.45, claimed as profits which could have been obtained from mill and planer operations if cars had been available for capacity operation and shipment, and (2) loss on sales of cants, $9,875.41. The computations appear to be based on capacity operation; that is, a production of 4,000,000 feet per month, or 16,000,000 feet for the reparation period, June to September 1950, both inclusive, which the witness for Wren termed "normal production," or the production in July and August 1948.

On June 1, 1950, Wren had on hand 285,3[illegible] feet of sawmill lumber and 77,919 feet of cants; on July 1, 543,733 and 182,766 feet, respectively; on August 1, 685,800 and 145,756 feet; on September 1, 1,165,768

[2] Now on appeal from a final judgment of the District Court for the District of Oregon (*Martin Bros. Box Co.* v. *United States*, decided May 15, 1953), setting aside the order dismissing the complaint.

and 480,798 feet; and on September 30, 1,408,033 and 560,784 feet. A witness for Wren presented at the hearing copies of a substantial number of car orders bearing dates in June, July, August, and September of 1950. Generally, they sought delivery or placement of 6 cars a day. On some there were notations indicating that 5 cars had been furnished on an order for 6; on some, the order-form notations indicated that 7 cars were furnished on an order for 6; on others there were no notations to indicate whether any cars had been furnished on a particular car order. The record indicates that there may have been other car orders on which Wren received cars during the period, but which the witness failed to bring to the hearing. The witness stated that Wren actually received 173 cars (of which 7 were stopovers) during the period June to September 1950, and that of 343 cars ordered during the period, Wren used 47 cars in October and 26 cars in November 1950.

Computations in support of Wren's claim for reparation were presented by a certified public accountant employed by Wren; they were reviewed by another certified public accountant employed by the defendant. From the latter's examination of Wren's records, it appears that of 350 cars ordered for spotting by Wren during the period June to September 1950, 197 were furnished. However, orders for 165 cars placed during the period were canceled. In the last 10 months of 1950, Wren ordered 557 cars, canceled orders for 245, and received 394, or 82 more than asked for on uncanceled orders. From this, the defendant argues that Wren was given a reasonable flow of empty cars for all the months during which it operated in 1950.

One of the partners, a principal witness for Wren, testified that the car-supply situation in 1951 for

Wren was "very good." In that year, Wren ordered for daily placement from 1 car to 4 cars. During the months of June to September, inclusive, Wren ordered as many as 4 cars on each of 5 days; for the remainder of the period the daily orders were for 2 or 3 cars. From this and the large cancellation of car orders made in September and October 1950, the defendant argues that orders of 6 cars per day during the summer period of 1950 were inflated and excessive. The number of feet of lumber shipped by Wren, by months for 1950 and 1951 are shown as follows:

Month	1951	1950	Month	1951	1950
January	666,586	0	August	1,448,908	1,873,728
February	83,119	0	September	1,141,382	1,626,078
March	110,038	1,001,061	October	1,551,318	1,723,700
April	60,482	1,207,061	November	462,085	816,694
May	490,896	1,429,970	December	473,900	608,145
June	1,293,778	2,269,640			
July	1,503,143	1,722,566	Total	9,286,241	13,978,599

Wren's profits exceeded $118,500 for 1948, $105,500 for 1949, and approximated $94,500 for 1950. The stated production capacity of 16 million feet of lumber and cants, used as the basis for the reparation sought, assumes that Wren would have operated at full capacity during the 103 working days in June through September 1950, with small or no margin for normal work stoppages due to injuries to employees, equipment breakdown, or other hindrance. The estimates for the 4-month period also assume that the prevailing prices for lumber would have remained in effect if Wren and all the other western Oregon mills had enjoyed a 100-percent car supply during the period.

Wren was entitled to just, reasonable, and nondiscriminatory car service. However, there is no absolute right of cars for any shipper, and the carrier

is liable in damages only if it fails to render a just and reasonable service. In *Midland Valley R. Co.* v. *Barkley,* 276 U. S. 482, 484–485, the Supreme Court said:

> The right of a shipper to cars is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The law exacts only what is reasonable from such carriers.

There were car shortages severe in nature on the Portland division of defendant's lines during the summer seasons of 1946 to 1950, inclusive. From the showing made of record, there is no ground for the assumption that Wren or any other of the 436 mills on the Portland division reasonably might have expected sufficient cars for maximum lumber-capacity production and, in addition, for lumber purchases during the summer months of 1950.

On the issue of discrimination, it is clear that Wren did not receive as many cars in the summer of 1950 as he desired, but neither did other mills on the Portland division. Wren was diligent in his efforts to obtain cars; so were other shippers in the territory, and some of them expended greater efforts to obtain cars than did Wren. There is some evidence that Wren did not receive cars in as close a ratio to capacity production as did other mills on the division during the time. This, the complainant asserts, was due to the method used in allotting cars to the mills on a quota, or rated, basis. A rating was assigned to Wren based on information furnished by it, as was done generally in the case of other mills, and these ratings were revised from time to time. In one such revision the rating for Wren was increased from 4 to

5 cars a day. Wren claims the rating should have been changed to 7 cars a day, and it is claimed that the proper official of the defendant was furnished information which warranted that rating. The official testified that he had no recollection of having received any such information. The official is criticized for not having used information furnished by the traffic manager of the defendant and also official publications relating to the lumber industry in Oregon in assigning ratings. It appears, however, that the same method was followed in assigning quotas or ratings for all mills on the Portland division, and apparently the results were unsatisfactory to all shippers who testified of record. The evidence falls short of establishing that Wren fared any worse, as a whole, under the quota system used than did the other shippers on the Portland division.

A careful study of the evidence bearing on the issue of damages to Wren is convincing also that it lacks sufficient definiteness to support an award of reparation. There is no convincing proof, if Wren had obtained all of the cars ordered, that it could have made any particular number of additional shipments, nor, if additional shipments had been made, what specific profits thereon could have been expected. In cases of this character, where special damages are sought, the proof thereof must be as definite and certain as would be necessary to support a judgment in court. *American Trading Corp.* v. *Seaboard Air Line Ry. Co.*, 201 I. C. C. 440, 443; *Lignum-Vitae Products Corp.* v. *Alabama G. S. R. Co.*, 268 I. C. C. 599, 608. The evidence before us fails to meet this test.

With respect to the alleged inadequacy of facilities and service, the defendant emphasizes that the number of carloads originated and terminated by it in Oregon was greater by 47,000 in 1951 than in 1950.

Of these, 15,635 cars consisted of lumber and forest products. The increase in the volume of lumber and forest products carried was 619,400 tons. As to the operation of freight trains, there were 1,672 westbound in the period April to October 1950 between Eugene and Crescent Lake as compared with 1,747 in the same period in 1951. In recent years the defendant has substantially increased its fleet of diesel locomotives and switchers, completed new retarder yards at Roseville and Los Angeles, Calif., increased its traffic density and freight-train speed, installed centralized traffic control on several portions of its lines in California, and planned such control on the lines between Crescent Lake and Klamath Falls. Also, at the time of the hearing the defendant had well under way a study of its several subdivisions of lines in Oregon, with a view to the installation of centralized traffic control thereon, including the Portland division, the Springfield subdivision, and the Shasta division. Installation of such control between Eugene and Crescent Lake was in progress at the time of the oral argument herein. By the end of 1954 it is expected that it will be completed between Eugene and Klamath Falls, a distance of 195 miles.

There are not enough cars made empty in Oregon nor in California, north of San Francisco, to satisfy demands for empty cars for loading in those areas. It is thus necessary for the defendant to move empty cars from the area around Los Angeles and from as far distant as Texas and Louisiana. A number of cars are received from the defendant's connections at Ogden, Utah. The necessity of bringing empties from such distant areas and over routes with such difficult operating conditions as that via Tehachapi, Calif., increases the hazards likely to restrict or stop the flow of cars to the Oregon territory.

The lack of facilities and the operation on the Siskiyou line between Ashland, Oreg., and Hornbrook, Calif., was criticized by witness for the Oregon commissioner. Prior to 1926 the Siskiyou line was the defendant's only entrance into Oregon. In June 1926 it carried 32½ trains per day. Inauguration of service over the Cascade line through Klamath Falls diverted traffic from the Siskiyou line so that in 1952 the average movement over the latter was 8.2 trains per day. The capacity of that line is the same now as in 1926. It now handles about 30 percent of the empty cars brought into Oregon. In 1926, locomotives operated over that line into Oregon had a rating of 645 tons; the locomotives now used to serve Oregon are for the most part diesels with a rating of 2,450 tons. With the Cascade line in service, western Oregon is now given about 11 times more train service than in 1926. Carloads originating on the defendant's lines in Oregon have increased 170 percent, and tons originated have increased 200 percent, 1951 over 1926. More than $630,000,000 was spent by the defendant in the last 20 years for additions and betterments to its property and for locomotives and cars, of which about $375,000,000 was expended in the last 6 years.

The defendant asserts that the car shortages which occurred during the summer of 1947 to 1950, inclusive, were the only severe peacetime shortages on its lines since 1923. Large surpluses of empty cars occurred in the period 1924 to late 1940. For example, in 1939 the defendant had on its lines an average daily surplus of 6,632 serviceable cars, and in 1940 the average was 5,374. That period was followed by an upsurge in traffic volume as a result of World War II, during which the defendant had difficulty in disposing of cars made empty on its lines. With

the end of the war, the situation suddenly changed and there was a car shortage until a decline in industrial production and in railroad traffic occurred in 1949. Shortly thereafter there followed an upsurge in traffic caused by the Korean conflict, so that the national traffic situation changed from a reported car surplus of some 35,000 to one of car shortages that became widespread and severe in many parts of the country, particularly in western Oregon. Moreover, the effect of the 5-day week, in terms of car shortage, was to reduce the Nation's car supply by about 175,000 cars. These car shortages, national in scope, were discussed in the 64th and 65th annual reports of this Commission to the Congress, and included the period covered by the complaint herein.

As a contributing factor to the defendant's difficulty in furnishing cars to its shippers during this period, the Association of American Railroads issued several car service orders or directives requiring the defendant to turn over to its connecting lines specified numbers of serviceable cars as described in the orders. Seven such orders were issued in 1946, 4 in 1948, 3 in 1949, 10 in 1950, and 7 in 1951. Four of these were still in effect in December 1950. Illustrative of the orders made effective during 1950 was one requiring the defendant to deliver to the Atchison, Topeka and Santa Fe Railway Company, called the Santa Fe, 500 plain boxcars suitable for merchandise loading at the rate of 50 cars daily. This order took effect on May 21, 1950, and was canceled on June 10, 1950. On June 1 it was modified so as to exclude Santa Fe plain boxcars from all distribution and loading, except in the State of Oregon, and requiring the return of such cars empty to their owners. Another order, effective on July 7, 1950, and canceled on August 3, 1950, required the defendant to withdraw

from distribution and return to owners all boxcars owned by The Western Pacific Railroad Company then located in California and Nevada. This order was superseded by another, effective July 10, which directed the defendant to deliver 50 empty serviceable plain boxcars daily to the Western Pacific for a 10-day period. Effective on July 16, 1950, another order required the defendant to deliver to the Union Pacific Railroad Company at southern California junctions, 50 serviceable plain boxcars daily, not including Canadian boxcars or cars routed home to owners at junctions where made empty. The order was amended on August 2 so as to increase the requirements to 125 cars daily, and again amended on August 17 to increase the demands to 200 cars daily. These orders aggravated the car-supply situation for the defendant at a time when it could not supply its own shipper demand.

During World War II the purchase of cars, locomotives, and many other materials were restricted by priorities. In the period 1940 to 1951 the defendant purchased 48,813 freight cars and 725 locomotives. Some 454 of the latter were diesels. Since 1946 the defendant has purchased some 30,680 cars, at a cost of approximately $380,000,000, and contributed some $79,000,000 for the purchase of refrigerator cars for the Pacific Fruit Express, in which the defendant has a half interest. Delays were experienced in the delivery of some of the equipment. Bad-order cars have been repaired with diligence. The defendant insists that it has done all within its power to serve its shippers.

Reference is made to an agreement reached by the railroads in July 1951 at Chicago, Ill., the principal points of which were to increase car ownership to 1,727,873 cars as of July 1, 1950, an increase of

122,000 cars; reduce bad-order cars to 5 percent of the ownership of each class of car on the road; speed up car handling so as to attain an average of 50 miles per freight car per day; avoid delays and other insufficiencies in freight car handling; and solicit shipper-receiver cooperation in freight-car efficiency.

The defendant, in recent years, has had on order numbers of cars much above the average for class I railroads. In carrying out the Chicago agreement, it has far exceeded the efficiency in operation there contemplated. In 1950, the defendant was moving freight cars more than 65 miles per day, and for all serviceable cars, 68 miles. Unserviceable cars on all class I railroads were about twice the percentage of that on the system lines of the defendant. For the period 1946 to 1951, the defendant exceeded the national average in additions to equipment.

General discussion and conclusions.—The production of lumber in western Oregon has been increasing steadily for a number of years, and in recent years the increase has been accelerated. This is an important factor in the car-supply situation complained of. While the defendant has not furnished all the cars desired by Oregon lumber shippers during the peak season in summer months, on an annual basis the cars furnished have approximated, and in some instances exceeded, those ordered by the shippers. While it may be that the defendant should have anticipated additional equipment needs earlier than it did, it may not be overlooked that no one could foretell with certainty the increased traffic demands made after World War II nor the handicaps experienced with governmental priorities in obtaining delivery on orders for new equipment. As stated, the car shortages in the periods complained of were largely national in scope, and there is no convincing evidence

that, on the whole, the complainant's members did not fare as well in the car service accorded them as did shippers generally in car-shortage areas elsewhere. In these circumstances, the record would not support a finding that the defendant is guilty of unreasonable laxity in meeting the great and largely unexpected demands made upon it in the periods referred to.

With respect to the present facilities and service of the defendant, the additional cars and diesels purchased, the improved facilities, and the increased operating efficiency in recent years, together with improved car distribution which should result from compliance with the order of the Oregon commissioner, effective June 27, 1953, may reasonably be expected to insure adequate car supply and service, and equitable car distribution, to the complainant's members in the future. However, should inequitable car distribution develop on any of the defendant's divisions, application should be made promptly to the Commission for relief, when consideration will be given to the issuance of a car service order requiring the defendant to distribute the available cars in an equitable manner.

We conclude that the record fails to establish that the defendant failed to provide transportation upon reasonable request therefor, or failed to furnish adequate car service within the limits of its capacity, or subjected any of the complainant's members to undue or unreasonable prejudice or disadvantage, as alleged. The complaint will be dismissed.

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In the Supreme Court of the United States

OCTOBER TERM 1958

No. 141

SHIPPERS' CAR SUPPLY COMMITTEE,
an Oregon corporation,
Appellant,

vs.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Appellees,

and

SOUTHERN PACIFIC COMPANY,
Intervening Defendant-Appellee

Motion to Affirm of Intervening Defendant-Appellee Southern Pacific Company

On Appeal from the United States District Court
for the District of Oregon

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> not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full."

During the periods of the car shortage the shippers' right to receive cars was qualified by car-distribution rules originating with the carrier and binding upon the shipper under the provisions of section 1 (11), Interstate Commerce Act (49 U.S.C. § 1 (11)). The Commission concluded that the ratings assigned all shippers were constructed on the same basis and did not subject the Committee's members to prohibited discrimination.

The Interstate Commerce Act contains a recognition of the propriety of the principle of so rating shippers during periods of short car supply:

> In Pennsylvania R.R. v. Sesman Short Line Co., 242 U.S. 120, 126 (1916), this Court stated:
>
> "* * * in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen * * * car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs."

We submit that appellant's complaint of the adequacy of the Commission's report presents no substantial question meriting further argument.

The Three-Judge Court Properly Sustained the Commission

Questions involving the existence of discrimination in carriers' car-distribution rules, the adequacy of a railroad's car supply and the sufficiency of its transportation plant, are patently within the primary jurisdiction of the Interstate Commerce Commission. Rochester Tel. Corp. v. United States, 307 U.S. 125, 139 (1939); Pennsylvania R.R. v. Clark

The Appeal Presents No Substantial Question

The Commission reviewed the evidence before it, made its findings of fact, and entered its order dismissing the complaint. No substantial question is raised by what the Commission did here: no questions of first instance are involved; no statutes are to be construed for the first time by this Court. Given the Commission's findings of fact, dismissal of the complaint before it was impelled.

The basic complaint of the Committee was the inability of its members to obtain all cars desired during peak shipping seasons. The Commission concluded that the car shortages at those times were national, not peculiar to western Oregon, and that the members of the Committee were no worse off than shippers in car-shortage areas elsewhere. The postwar demand responsible for car shortages the Commission found to be unexpected, and it refused to hold Southern Pacific guilty of unreasonable laxity in meeting the demands referred to.

The rule is that carriers do not have an absolute duty to furnish cars, for, as this Court said in *Midland Valley R.R. v. Barkley*, 276 U.S. 482, 484-85 (1928):

> "* * * The right of a shipper to cars is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The law exacts only what is reasonable from such carriers."

To the same effect is *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 133 (1915):

> "Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But that is not an absolute right and the carrier is

The shortages in Oregon were largely the result of unprecedented expansion of the lumber industry at a time when the railroads were striving to improve transportation plants after years of depression and war. Defendant Southern Pacific far surpassed the performance of the nation's railroads on the whole in augmenting equipment and improving efficiency. Notwithstanding this, car shortages in western Oregon occurred from time to time during peak shipping months. Defendant Southern Pacific was hampered in its efforts to alleviate the western Oregon car shortage because Oregon is a deficit state, where the demand for empty cars substantially exceeds the number of loaded cars moved into the state and made empty there. To improve the Oregon supply Southern Pacific brought empty cars from junctions as far away as Texas, Louisiana and Utah, and such drawn-out supply lines were vulnerable to interruption. Its efforts were further hindered by car service orders made to balance the national freight-car pool requiring it to turn over to connecting lines at various junctions large quantities of empty cars to alleviate worse shortages elsewhere, at a time when it could not meet the demand in Oregon.

The district court, upon review, stated (160 F. Supp. at 944):

> "The Commission's conclusion that the record fails to establish that the defendant failed to provide transportation upon reasonable request therefor, or failed to furnish adequate car service within the limits of its capacity, or subjected any of the complainant's members to undue or unreasonable prejudice or disadvantage, as alleged.'
>
> is a logical and rational conclusion from its Findings of Fact and therefore the Commission was not arbitrary and capricious in issuing its Orders and the same are final."

quent to the charge that its facilities had received the saturation point Southern Pacific demonstrated its ability to handle an even greater volume of traffic. The Commission further noted the substantial improvements made by the company to alleviate future car-distribution problems. (pp. 330-31)

The preceding statements in the report dispose of all of the Committee's major contentions except the charge that Southern Pacific failed to distribute available empty cars equitably and to employ an adequate staff of competent employees to supervise and perform that work.

The Commission in its report states that when cars were short they were distributed by Southern Pacific according to a procedure whereby each mill received a proportionate share of the available cars in accordance with its assigned rating. The members of the Committee charged that these ratings were inequitable.

The Commission's report describes the establishment of these ratings in accordance with mill capacities. (p. 344)

The Commission refused to conclude that the rating system was discriminatory; instead the Commission concluded that, whatever the objections to it, the method was at least applied uniformly. This is clear from its conclusions respecting the Warren claim for damages. (p. 340)

The Commission's report lucidly discloses its reasoning as to the causes of the complaint before it and the responsibility for the difficulties related to it by the shippers.

A fair summary is that there were car shortages at times during the peak summer months of 1946 through 1950 and a part of 1951 in western Oregon, and that these car shortages hindered the members of the Committee and other shippers. These car shortages were regional manifestations of car shortages national in scope which occurred at approximately the same periods.

the national railroad system, it refused to hold it guilty of unreasonable laxity to meet unexpected demands.

The Commission first looked to the depression era of the 1930s and found that Southern Pacific was then oversupplied with cars. Then came World War II, in which Southern Pacific actually had a surplus of empty cars as a result of wartime freight moving to West Coast ports. From 1923 until the end of World War II Southern Pacific thus had no serious car shortages on its lines. The shortages complained of commenced in 1946. (p. 351)

The Commission reviewed what Southern Pacific had done to meet these shortages, and stated that its performance exceeded that of the railroads generally. Since the end of World War II Southern Pacific exceeded the national average in additions to equipment, ordered far more cars than the average for Class I railroads, and kept its proportion of unserviceable cars to half that of the national average. (pp. 352-53)

There is another facet to the Committee's complaint, and that is that Southern Pacific failed to expand its transportation plant (other than rolling stock) to meet the postwar demands. Various witnesses for the Committee assailed the adequacy of railroad yards at Brooklyn, Eugene and Roseburg, Oregon. The capacity of main lines over the mountains between Oakridge and Crescent Lake, Oregon, and between Ashland, Oregon, and Black Butte, California, was termed inadequate to handle the shipments originating in western Oregon. A witness for the Oregon Public Utility Commissioner expressed the opinion that traffic on the Oakridge-Crescent Lake track reached the saturation point in 1950. (pp. 341, 342)

Southern Pacific introduced evidence to refute these charges, and the Commission found it persuasive. Subse-

> "* * * (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people. * * *."

It would have been obviously impossible for Southern Pacific, regardless of the extent of its car ownership, to satisfy completely the shippers on its lines so long as the requirements of shippers on other units of the national railroad system could not reasonably be met.

The Commission believed that anticipation of future transportation needs involved prediction of future economic trends, and looked back to see whether Southern Pacific had acted reasonably in equipping itself to handle the demands which subsequently materialized. It stated that no one could have foretold with certainty the increased traffic demands which would be encountered after World War II, nor the handicaps to be experienced during the war and afterwards with governmental priorities on new equipment orders. It examined Southern Pacific's performance subsequent to the war and concluded that its record was substantially superior to that of railroads nationally. Believing that Southern Pacific had done more than its share to strengthen

The report next explains why, in times of national car shortages, the Oregon shippers experienced difficulty. The basic cause is that Oregon is a deficit area for empty cars: that is, the number of loaded cars terminating in the state is insufficient to provide empty cars for the local demand, and thus empty cars must be imported from other states. As the supply lines in shortage periods stretched out to such distant states as Louisiana — thousands of miles from Oregon — the exposure to possible interruption in the supply of empty cars increased. (p. 3560)

The freight cars which Southern Pacific and other railroads owned could not be preferentially employed to their more profitable service, as they form a national pool of cars which move freely in accordance with national demands. Thus Southern Pacific could call upon other railroads to surrender cars in their possession to help satisfy the demands in Oregon and elsewhere, and, conversely, other railroads could call upon Southern Pacific to provide them with cars to assist in meeting their requirements. The balancing of empty car supplies was supervised in the first instance by the Association of American Railroads.[2] The Commission stated that car service orders issued by the Association hampered, determent Southern Pacific at a time when it could not supply its own shippers. (pp. 3561-3562)

The Committee's position is that the post-war car shortages in Oregon could have been averted if Southern Pacific had sufficiently augmented its facilities beforehand, and that Southern Pacific should have foreseen the Oregon demand and done so. However, no one railroad can alone assure its

2 Instituted as the Association was during its car service appeal of the Commission in the Shippers of its objectives, Southern Pacific was under legal obligation to obey strictly and conform promptly to the orders under the provisions of Sec. 1 [illegible] of Part I Interstate Commerce Act. [illegible]

ARGUMENT

The Report of the Commission Provides a Rational Support for Its Findings of Ultimate Fact

The Commission's findings of ultimate fact cover two topics: first, the adequacy of Southern Pacific's transportation plant and car supply, and, second, the asserted undue discrimination against the Committee's members. As does the preceding text of the Commission's report, these findings to some extent overlap; but a sufficient distinction is preserved so that the two topics may be considered separately.

The report of the Commission, at pages 335 to 341 and 345 to 346, describes the experiences related by witnesses for the Committee who were unable to obtain sufficient empty cars for loading in the peak summer months of 1950 to 1950 and a part of 1951. While the subjective experiences of the individual witnesses demonstrate that a car shortage at times existed, they do not explain why the carrier could not comply with all of the requests for cars, nor explain the causes of the car shortages.

The Commission stated that the shortages in western Oregon should be viewed not in isolation but rather against the background of national transportation conditions at those times. The situation in Oregon was a local manifestation of a nationwide problem affecting railroads and their shippers generally, not just Southern Pacific and the Committee. (pp. 331, 333)

Although appellant indicates that these conclusions constituted conclusions of law, it is well established that they rather constitute findings of ultimate fact by the Commission. As the district court stated in footnote 5 in its opinion:

> "The courts have repeatedly pointed out that whether given rates or practices are "reasonable" or "unduly prejudicial" are factual determinations confided by Congress to the judgment and discretion of the Commission. That this must be so is manifest since the sections of the Act involved contain no definition of what is reasonable or unreasonable or what constitutes undue prejudice. We quote from or summarize a few of the decisions. In Virginian Ry. Co. v. United States, supra, 272 U.S. [658] at page 669, 47 S.Ct. [292] at page 295, [71 L.Ed. 463], it was held: "The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal informed by experience." Interstate Commerce Commission v. Martin Bros. Box Co., 9 Cir., 219 F.2d 811, at page 813."

Appellant is thus actually contending that the Commission's findings of ultimate fact are inconsistent with and are not sustained by various statements and conclusions appearing in the preceding text of the Commission's report. Therefore, the question on appeal should be restated as follows:

> "Does the report of the Commission indicate that the Commission was acting arbitrarily or capriciously, i.e., does the report of the Commission provide a rational support for its findings of ultimate fact?"

Although appellant in the district court contended that the record before the Commission did not contain substantial evidence to support the Commission's findings of fact, its statement of Questions Presented indicates it is advancing no such contention in this appeal. Indeed, appellant's Statement of Jurisdiction specifically disclaims doing so:

Wren filed a petition in the district court for the district of Oregon, seeking *review* of the Commission's order.

The district court recognized that *two* separate and distinct forms of relief *were* sought by the petitioners. *Wren* sought damages for alleged violations of law in the past, *while* the Committee sought relief for the future. The *Wren* claim *was* personal, *whereas* that of the Committee *was* in the nature of a class action seeking relief legislative in effect for the future.

A three-judge court *was* convened under the provisions of 28 U.S.C. §§ 1336, 1398, 2321-2325 and 2284, and 49 U.S.C. § 17(9). That court recognized that it should not, as a three-judge court, concern itself *with* a *review* of that portion of the Commission's findings and order dismissing *Wren's* claim for damages. *United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 443 (1949). The three-judge court thereupon severed the *Wren* claim and referred it to a single judge for hearing, *where* it is *now* pending in the district court.

The issues *reviewed* by the three-judge court concern only future relief and not damages for past transactions. The Committee's appeal to this Court is so limited.

Question Presented on Appeal

The "Questions Presented", as stated by appellant in its Statement of Jurisdiction, are *whether* the report and order of the Commission contain findings to sustain its follow*ing* conclusions:

> "The record fails to establish that the defendant failed to provide transportation upon reasonable request therefor, or failed to furnish adequate car service *within* the limits of its capacity, or subjected any of the complainant's members to undue or unreasonable prejudice or disadvantage, as alleged."

meeting carriers at Portland, Salem, Albany and Eugene, Oregon.

When sought an award of damages of $134,385.50 for alleged failure to furnish it with sufficient cars.

Southern Pacific denied the allegations of the Committee and its supporting intervenors and asserted as an affirmative defense that the car shortages referred to were but local manifestations of contemporaneous national shortages which resulted from a number of causes, for none of which it could or should be held liable. It further asserted that it had done, and would continue to do, all within its power, circumscribed only by financial limitations, availability of materials, and production capacity of suppliers, to acquire and maintain an expanded car supply and locomotives to move them and to provide a railroad system reasonably adequate to meet the needs of its public.

A hearing was held before an examiner of the Commission for four days in December of 1951 at Portland. Three additional days of hearing were held in September 1952.

The examiner issued a proposed report, and exceptions and replies thereto were filed by the parties. Oral argument was held before the Commission at Washington, D. C., and it thereafter issued its report and order: 292 I.C.C. 537 (Appendix). The unanimous report of the Commission, Division 3, concludes "that the record fails to establish that the defendant [Southern Pacific] failed to provide transportation upon reasonable request therefor, or failed to furnish adequate car service within the limits of its capacity, or subjected any of complainant's members to undue or unreasonable prejudice or disadvantage." (p. 553) The Commission dismissed the complaint.

In January 1956, some fifteen months after the denial by the Commission of reconsideration, the Committee and

and did so seek damages. /s shall be explained in connection with the proceedings before the district court, that claim is not before this Court now.

The allegations of the complaint constituted, in summation, an accusation that Southern Pacific had been derelict in its duty to serve Oregon lumber shippers. The gravity of this implication prompted the Public Utility Commissioner of Oregon to intervene on behalf of the Committee, with the result that what had been instituted as a complaint proceeding between private litigants developed into virtually a general investigation.

The Committee and the Public Utility Commissioner sought an order directing Southern Pacific to cease and desist from unlawful acts or practices in respect to car supply and distribution and the adequacy of its facilities. They asked the Commission to require Southern Pacific, in furtherance of the general objective of such an order, to—

acquire additional freight cars;

install a centralized traffic control system on its line between Oakridge and Crescent Lake, Oregon;

extend the length of sidings between Oakridge and Crescent Lake, Oregon;

adopt uniform rules to govern car distribution practices;

acquire an adequate staff for the equitable application of car distribution rules;

build additional interchange tracks at Portland, Oregon; and

make additional interchange arrangements with con-

1 A technical term for an electronic system of directing the movements of trains from a single central *switchboard* instead of by operating timetables or instructions from the train dispatcher relayed by station operators to train crews.

(Commerce (Commission inveking sections 1(4), 1(11), and 3(1) of the Interstate (Commerce Act (49 U.S.C. §§ 1(4), 1(11) and 3(1), respectively), alleging that Southern Pacific had failed to provide transportation upon reasonable request; had failed to furnish adequate car service; had caused undue and unreasonable prejudice and disadvantage to the individual members of the Committee by failure to provide the same proportion of car service requirements to them as was furnished other shippers in Oregon and elsewhere; and had caused undue and unreasonable prejudice and disadvantage to Oregon shippers generally while giving undue and unreasonable preference and advantage to shippers in other states; and that these acts had caused the Committee's members lost sales, lost goodwill and lost profits, for which Southern Pacific should be held liable.

The gravamen of the complaint to the Commission lay in the railroad car shortages which existed from time to time during peak shipping months subsequent to World War II and until the filing of the complaint in 1950. The Committee, principally comprised of certain shippers of lumber or forest products, alleged that these car shortages, in Oregon, resulted from unlawful acts of Southern Pacific and sought this from the Commission: first, that Southern Pacific be held responsible in damages to the Committee's members and, second, that Southern Pacific be ordered to cease and desist in the future from the conduct of unlawful practices in respect to car service, car supply, and transportation facilities.

The prayer for damages was made for the benefit of any member of the Committee who might be prepared to present evidence and seek a finding for his individual benefit. One of its 93 members, the partnership of A. L. Mechanis and Cosima D. Mechanis, doing business as Tron Planing Mill (which shall be referred to as Tron), intervened separately

STATEMENT

The Parties

Appellant, Shippers' Car Supply Committee, will hereafter be referred to as the Committee, appellee Interstate Commerce Commission as the Commission, and intervening defendant-appellee, Southern Pacific Company, as Southern Pacific. Southern Pacific is the defendant in the proceeding before the Commission and exercised its right under 28 U.S.C. § 2323 to intervene as a party defendant in the district court, from whose decision this appeal is taken. Other parties who appeared before the Commission but are not involved in this appeal are the Public Utility Commissioner of Oregon and Cosima D. Medonis and A. L. Medonis, doing business as Iron Planing Mill, intervenors on behalf of complainant Committee. The Commissioner did not appear in, and Iron Planing Mill's claim is still pending before, the district court.

Prior Decisions

The opinion of the district court is reported in Shippers' Car Supply Committee v. Interstate Commerce Comm'n, 160 F. Supp. 930, and is also set forth as an appendix to appellant's Statement of Jurisdiction. The report of the Commission is reported sub nom. Shippers Car Supply Committee v. Southern Pacific Co., 292 I.C.C. 337 (1954), and is set forth as an appendix to this motion. References herein to pages of that opinion are to the pagination of the official reports, which is retained in the appendix.

Facts

Southern Pacific is a railroad engaged in interstate commerce, serving, among others, the state of Oregon.

On November 6, 1950, Shippers' Car Supply Committee, an Oregon corporation, filed a complaint with the Interstate

In the Supreme Court of the United States

October Term 1955

No. 141

Shippers' Car Service Committee,
an Oregon corporation,
Appellant,

vs.

Interstate Commerce Commission and
United States of America,
Appellees,

and

Southern Pacific Company,
Intervening Defendant-Appellee

Motion to Affirm
of
Intervening Defendant-Appellee
Southern Pacific Company

On Appeal from the United States District Court
for the District of Oregon

Comes Now Southern Pacific Company, a corporation, intervening defendant-appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, and moves that the final judgment and decree of the District Court for the District of Oregon be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

Coal Co., 238 U.S. 456, 469 (1915); *Louisville & N. R.R. v. Corp.*, 54 F.2d 8, 10 (6th Cir. 1931).

Review of orders of the Commission has, over the years, been subject to certain very definite limitations. In *Interstate Commerce Comm'n v. Mechling*, 330 U.S. 567, 574 (1947), this Court said:

> "Judicial review of the findings of fact and the expert judgments of the Interstate Commerce Commission where the Commission acts within its statutory authority is extremely limited."

There is first a presumption of validity of the Commission's orders.

Federal Power Comm'n v. Hope Gas Co., 320 U.S. 591, 602 (1944);

Interstate Commerce Comm'n v. Jersey City, 322 U.S. 503 (1944);

Rochester Tel. Corp. v. United States, *supra*, 307 U.S. at 145-46.

The judicial function of the Court is exhausted when there is found to be a rational basis for the Commission's conclusions.

United States v. United States Smelting, R. & M. Co., 339 U.S. 186, 193-94 (1950);

Swift & Co. v. United States, 343 U.S. 373, 382 (1952);

Ayrshire Collieries Corp. v. United States, 335 U.S. 573, 593 (1949);

Interstate Commerce Comm'n v. Jersey City, *supra*, 322 U.S. at 522-23;

Swift & Co. v. United States, 316 U.S. 216, 230-31 (1942);

Rochester Tel. Corp. v. United States, *supra*, 307 U.S. at 146.

Next is the doctrine of administrative finality, succinctly stated by this Court in *Rochester Tel. Corp. v. United States, supra*, 307 U. S. at 139-40:

> "* * * The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm'n v. Illinois Central R. Co.*, 215 U.S. 452, 470; *Interstate Commerce Comm'n v. Union Pacific R. Co.*, 222 U.S. 541."

This doctrine has been specifically applied to decisions of the Interstate Commerce Commission respecting car supply and distribution. *St. Louis, etc., Ry. v. Brownsville Dist.*, 304 U.S. 295, 301; *Pennsylvania R.R. v. Puritan Coal Mining Co., supra*, 237 U.S. 121, 134; *Midland Valley R.R. v. Excelsior Coal Co.*, 86 F.2d 177, 181 (8th Cir. 1936); *Martin Bros. Box Co. v. Interstate Commerce Comm'n*, 219 F.2d 811 (9th Cir. 1955), *cert. denied*, 350 U.S. 823.

The three-judge court therefore properly viewed its duty and powers in these terms:

> "Our inquiry and office is not to weigh the evidence nor question the soundness of the reasoning 'of a tribunal (Commission) appointed by law and informed by experience,' but to determine if the Commission's Findings and Order lay within its statutory power and are supported by substantial evidence in the record as a whole and free from arbitrary and capricious action." (160 F.Supp. at 943)

That court, in the exercise of its function, stated:

> "While in some phases the evidence offered by the parties before the examiner is contradictory from the

documentations in the briefs of the parties and from the record as a whole, suffice, to say, the record reveals that the Commission's Findings of Fact are supported by substantial evidence and that its conclusions are rational." (160 F.Supp. at 944)

"* * * The Commission's conclusion that the record fails

'—to establish that the defendant failed to provide transportation upon reasonable request therefor, or failed to furnish adequate car service within the limits of its capacity, or subjected any of the complainant's members to undue or unreasonable prejudice or disadvantage, as alleged.'

is a logical and rational conclusion from its Findings of Fact and therefore the Commission was not arbitrary and capricious in issuing its Orders and the same are final." (160 F.Supp. at 944)

The cause before the three-judge court, as before this Court, involves only relief for the future.

The court concluded that the controversy before it was moot (160 F.Supp. at 943). This, too, is a reasonable conclusion. The Committee sought, it will be recalled, revised rules for the distribution of cars, and that Southern Pacific be compelled to install a centralized traffic control system on one of its main lines, expand its passing tracks, and increase the capacity of its yards.

The record before the Commission was closed in September, 1952. At that time it portrayed a picture of dynamic progress in the improvement and expansion of Southern Pacific's plant in Oregon. At oral argument in February, 1954, the Commission was advised that, respecting the centralized traffic control system, "Installation of such control between Eugene and Crescent Lake was in progress" (292 I.C.C. at 550).

Moreover, the Oregon Commissioner made an order on June 27, 1953, which was adopted by Southern Pacific for interstate traffic. It provides that:

> "car ratings for shippers of lumber shall be based on prior loading performance of each shipper, determined from a fair average of the highest loadings in 3 months of each of the 2 preceding calendar years, giving due consideration to new or changed facilities and present or anticipated shipments by water or motor carrier." (p. 545)

The Commission clearly believed that future car service would be improved by the enlarged facilities of Southern Pacific and the expanded car fleet of the nation's railroads. The railroad's car distribution rules, too, had been superseded by similar rules proposed by the Public Utility Commissioner of Oregon.

> "With respect to the present facilities and service of the defendant, the additional cars and diesels purchased, the improved facilities, and the increased operating efficiency in recent years, together with improved car distribution which should result from compliance with the order of the Oregon commissioner, effective June 27, 1953, may reasonably be expected to insure adequate car supply and service, and equitable car distribution, to the complainant's members in the future." (p. 553)

In the event the future were not as satisfactory as anticipated, the Commission invited the Committee to return:

> "* * * should inequitable car distribution develop * * * application should be made promptly to the Commission for relief, when consideration will be given to the issuance of a car service order requiring the defendant to distribute the available cars in an equitable manner." (p. 553)

The relief which the Commission offered the Committee would be of immediate help if the Committee should feel that Southern Pacific were unlawfully discriminating in the distribution of empty cars. The car service order is an extraordinary power of the Commission, which may be exercised "at once, without answer or other formal pleading by the interested carrier, * * * and without notice, hearing or * * * report" whenever the Commission "is of opinion that shortage of equipment, * * * or other emergency requiring immediate action exists in any section of the country". The Commission may then "make such just and reasonable directions with respect to car service * * * as in its opinion will best promote the service in the interest of the public." (49 U.S.C. § 1(15))

The Commission believed that the facts comprising the background of the Committee's complaint had so changed that affirmative orders respecting the future were not warranted. This belief, incidentally, gained some confirmation from the complaining shippers; there was evidence that the shortages were easing by 1951.

> "One of the partners, a principal witness for Wren, testified that the car-supply situation in 1951 for Wren was 'very good'." (p. 548)

If the Committee should subsequently believe that Southern Pacific was unlawfully discriminating against its members by inequitably distributing cars, then, said the Commission, the extraordinary and immediate remedy of a car service order would be available.

It was the evident view of the district court that the lapse of time from September 1952 to January 1958 (which included a delay from October 1954, when reconsideration was denied by the Commission, to January 1956, before the Committee filed its petition in the district court), in view of a

1952 record which showed the background facts to be in a dynamic state of flux, was sufficient to render the plea for future relief moot. This is a sensible and logical conclusion, for, even if the court had been inclined to strike down the decision of the Commission, the court could only have remanded the cause to the Commission. The three-judge court could not, after reviewing the record, direct the Commission to enter certain findings, nor could the court itself make findings and prescribe appropriate measures of relief for the future.

> *Eastern-Central Ass'n v. United States*, 321 U.S. 194, 212 (1944);
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> *United States v. Jones*, 336 U.S. 641, 672-73 (1949).

If once placed in the Commission's hands again, it would be inconceivable that that body would make findings and issue orders respecting future conduct without holding hearings to determine what the facts are today—especially if Southern Pacific offered to prove, as it would, that substantially all of what was sought by the 1950 complaint has, in the course of progress over the intervening years, been accomplished.

The district court's ruling that the controversy before it had become moot and should be dismissed was, it seems to us, a ruling upon a matter in abatement:

> "Abatement at law is the overthrow or destruction of a pending action apart from the cause of action."
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> *Bowles v. Wilke*, 175 F.2d 35, 37-38 (7th Cir. 1949), *cert. denied*, 338 U.S. 861, quoting 1 C.J.S., *Abatement and Revival*, § 1

The court's ruling would terminate the suit before it without reference to the merits of the controversy; such a ruling

in the district court upon matters in abatement is not reviewable on appeal.

28 U.S.C. § 2105;
Bowles v. Wilke, supra, 175 F.2d at 37.

While we do not imply that the Committee's appeal is frivolous, we do point out that its quest for future relief upon an aging record is undoubtedly the most roundabout possible approach. We say this because the Commission, in its report, invited the Committee to return for a car service order (which could be issued without notice or hearing) if the future car-supply situation did not meet expectations. The Committee could also at any time file a new complaint with the Commission, or possibly reopen this docket, seeking an order appropriate to today's facts rather than those of 1946-1952. While not as expeditious as a car service order, such procedures would be substantially more expeditious than a subsequent remand of this cause to the Commission, with consequent further hearings. We thus believe argument in this Court on the issue of future relief is neither warranted nor appropriate, so long as the doors of the tribunal of first instance remain open to the Committee, as they do.

CONCLUSION

We respectfully submit that appellant presents no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Dated at San Francisco, Calif., this 25th day of July, 1958.

Respectfully submitted,

CHARLES W. BURKETT, JR.

Attorney for Intervening Defendant-Appellee Southern Pacific Company

JAMES E. LYONS
JOHN MACDONALD SMITH
GEORGE B. CAMPBELL

Of Counsel

Proof of Service

I, Charles W. Burkett, Jr., one of the attorneys for Southern Pacific Company, intervening defendant-appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 25th day of July, 1958, I served copies of the foregoing Motion to Affirm on the several parties herein as follows:

1. On the United States, by mailing a copy in a duly-addressed envelope with airmail postage prepaid to C. E. Luckey, Esq., United States Attorney for Oregon, at the United States Court House, Portland, Oregon; and by mailing a copy in a duly-addressed envelope with airmail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly-addressed envelope with airmail postage prepaid to Robert W. Ginnane, its Chief Counsel, at the offices of the Commission, 12th Street and Constitution Avenue, Washington 25, D. C.

3. On Shippers' Car Supply Committee, appellant, by mailing a copy in a duly-addressed envelope with airmail postage prepaid to its attorneys of record, William P. Ellis, Esq., and Dean Ellis, Esq., at their office at 1102 Equitable Building, Portland 4, Oregon.

CHARLES W. BURKETT, JR.

(Appendix follows)

Appendix

Interstate Commerce Commission

No. 30708

Shippers Car Supply Committee[1]

v.

Southern Pacific Company

Submitted February 11, 1954. Decided May 26, 1954

Defendant not shown to have failed to provide transportation of property upon reasonable request therefor, or to have failed to furnish adequate car service within the limits of its capacity, or to have subjected complainant's members in western Oregon to undue or unreasonable prejudice or disadvantage. Complaint dismissed.

William P. Ellis and *Dean Ellis* for complainant and certain interveners.

Clifford W. Ferguson, Thomas W. Deuch, Robert R. Clark, and *Donald A. Haakenson* for Public Utilities Commissioner of Oregon, intervener.

James E. Lyons, Charles W. Burkett, Jr., James C. Dezendorf, and *Stanfield B. Johnson* for defendant.

REPORT OF THE COMMISSION

Division 2, Commissioners ALLDREDGE, ARPAIA, and FREAS

By Division 2:

Exceptions to the report proposed by the examiner, and replies thereto, were filed by the parties. We have heard the parties in oral argument. Exceptions and requested findings

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[1]Complainant is a nonprofit corporation of Oregon dedicated to the purpose of improving the freight car supply and the quality of railroad service, especially in western Oregon.

not discussed herein nor reflected in our findings or conclusions have been considered and found not justified.

By complaint filed on November 6, 1950, the complainant charges the defendant with the following specific violations of law:

1. Failure to provide transportation of property upon reasonable request, particularly in failing to provide adequate trackage, motive power, and other facilities and equipment to meet the demands of the shipping public, in violation of section 1(4) of the Interstate Commerce Act.

2. Failure to furnish adequate car service, particularly (*a*) in failing and neglecting to purchase or construct a supply of cars adequate for the needs of its shippers; (*b*) failing to effect suitable arrangements with connecting carriers for interchange of empty and loaded cars; and (*c*) failing to employ an adequate staff of competent employees to promptly, efficiently, and fairly distribute the supply of cars available, in violation of section 1(11) of the act.

3. Causing undue and unreasonable prejudice and disadvantage to complainant's members by failure to provide car service to them in the same [537] proportion to actual requirements as were provided to other shippers on its lines in Oregon and elsewhere, contrary to section 3(1) of the act.

4. Causing undue and unreasonable prejudice and disadvantage to shippers generally on its lines in Oregon and giving undue and unreasonable preference and advantage to other shippers on its lines in other States, in violation of section 3(1) of the act.

5. Causing substantial increases in transportation and marketing costs, substantial losses in labor, production, and profits of complainant's members and others, by curtailing their production by preventing them from making deliveries on contracts and from selling their products in the open market, which has re-

sulted in damage and loss of goodwill for which the defendant is liable.

The complainant seeks an order directing the defendant to cease and desist from the unlawful acts alleged, and requiring it to provide the complainant's members and other shippers on the defendant's lines in western Oregon with adequate and nondiscriminatory service and facilities, and to pay to the complainant's members such damages as may be claimed and established by them, with reasonable counsel fees.

The Commissioner of Public Utilities of Oregon intervened generally in support of the complainant. A. L. MacInnis and Cosima D. MacInnis, doing business as Wren Planing Mill, intervened in support of the complainant and, in addition to a prayer for general relief, seek an award of damages.

The defendant answered, challenging the sufficiency of the complaint and alleging that there is a defect of parties defendant in that connecting lines are necessary parties with respect to the matters alleged. Concurrently with the filing of its answer, the defendant made a motion to dismiss the complaint and, alternatively, to make the same more definite and certain. This motion was overruled on February 8, 1951, but without prejudice to the defendant's requesting, at the close of the complainant's testimony, a further hearing for the introduction of evidence respecting those allegations of the complaint which the defendant claimed are indefinite and uncertain. Such a further hearing was held.

The chairman of the complainant committee has been engaged in the wholesale lumber business as the Trio Lumber Company at Eugene, Oreg., for more than 25 years. He owns an interest in the Douglas Manufacturing Company, a saw-

mill and remanufacturing plant near Roseburg, Oreg., with an output of 90,000 feet per day, and in the Ada Company, of Ada, Oreg., producing 25,000 to 30,000 feet per day. The market for his lumber generally, and that of other shippers who testified of record, is practically throughout the United States. The practice of billing is not uniform. Sometimes the company is shown as the shipper, sometimes the mill, and in some instances the purchaser of the lumber is named as the shipper. The inability to obtain cars when desired caused the chairman of the complainant in 1946 **[538]** to investigate the causes for the lack of cars for Oregon lumber shippers. He contacted the western representative of the Association of American Railroads in Seattle, Wash., and described the situation, but without results. Thereafter, following the car shortage of 1947, he and two other firms, by letters, requested an investigation by the Commission of the lack of car service to western Oregon lumber shippers, but apparently no relief was obtained. In 1948, he was appointed chairman of a traffic committee for the Western Forest Industries Association. The purpose of the association was to make an investigation among shippers with a view to remedying the situation caused by the car shortage. During the investigation, it was determined that an organization devoted solely to investigating the car supply should be formed, and the complainant committee was created for the purpose.

The car shortage at Eugene was serious during the summer months of 1946 and for subsequent summer seasons, including 1950 and some of 1951. During these months of heavy demand, a customer could not be advised when a shipment would be made because of the lack of cars. This condition affected western Oregon lumber shippers, particularly those located on the lines of the defendant, to such an extent

that they lost the so-called "premium business," that is, business commanding premium prices for quick shipments. The inability to get cars when needed caused the mills to take orders for short periods instead of a normal 30-day order supply. The car shortages of 1946 and 1947 caused purchasers to operate in much the same manner. This eventually led to the practice of the so-called transit sales. Although not satisfactory either to the producer or the buyer of the lumber, 50 percent or more of the volume shipped from western Oregon was forced into this practice because of inability to arrange for the shipment of a carload when needed.

In 1950 the chairman of the committee went into the State of Washington to obtain cars to be stopped off for completion of loading in Oregon. This caused extra expense and delay. Shippers could obtain cars from railroads in Washington, put a small amount of lumber therein, and route them through Oregon to complete loading. The routing of such cars generally was "UP-SP-UP." For a time no definite amount of lumber had to be loaded to obtain the use of a car. Later, 25 percent of the carload minimum weight was required. That requirement was hard to meet because of the difficulty and cost of obtaining the quantity and quality of lumber desired. This caused the wasteful use of cars and afforded slight relief. In some instances lumber was hauled by truck as much as 200 miles from origins (local to the defendant) to Portland, Oreg., for partial loading, and some cars were fully loaded from the trucks in Portland. **[539]**

The failure to get cars when needed caused many mills to shut down during the summer months of 1946-50. The situation was particularly bad in 1949 and 1950. When the lumber could not be shipped substantially as produced, storage costs became prohibitive. Shipping members of the com-

plainant at Grants Pass, Oreg. (local to the defendant), experienced severe car shortages during the summer of 1947-50. One of the complainant's members operates a custom milling business and molding plant at Grants Pass with a daily capacity of 8 cars. During the car-shortage periods of 1949-50, he received as low as 1 car or 2 cars per day. The mill had storage for some 5,000,000 feet of lumber, but when that much lumber accrued the plant had to stop work, thus causing a shutdown of all supplying mills. Handling and storing large quantities of lumber resulted in extraordinary inconvenience and expense, and the cost of such operations could not be added to the price of the lumber or millwork. Shippers generally, and particularly those at Grants Pass, complained of poor service, such as switching, time changes in switching, and the manner of handling orders for cars. Some 15 other witnesses representing lumber shippers who operated from 1 mill to 5 mills and produced large quantities of lumber for shipment by rail, most of whom were dependent for cars upon the defendant, testified to the same effect.

Witnesses for feed and seed dealers in Oregon, located on the defendant's lines at such points as Cornelius, Gladstone, and Roy, described as serious to them the car shortages of 1946 and 1947. Their greatest losses caused by lack of cars were during the summer months of those years. Some of their plants are located also on the lines of the Spokane, Portland and Seattle Railway Company, and some on the lines of both the defendant and the Oregon Electric Railway Company. At most of the times they were able to obtain cars as needed at the competitive points. The bad effects of the 1950 car shortage was reduced by trucking their grain to Portland. The 1951 crop was about 10 percent of the normal volume, so that little of it was offered for shipment in that year.

Witnesses for lumber interests of Grants Pass testified at the adjourned hearing as to conditions existing during the summer months of 1952. Operations of the Engler-Hudson Company located some four city blocks from the defendant's station, were described. This company operated 2 shifts daily and produced some 250,000 feet per day. The capacity of the plant was rated as 8 cars per day. On 6 of the first 10 business days of July, orders were not filled, although presumably there was no car shortage elsewhere on the defendant's line at that time. On July 11, six cars were furnished. A shortage of cars was experienced every other working day in July (1952), except 2. The record for the month was 113 cars ordered and 82 **[540]** furnished, a shortage of 31. For August, on 7 working days, the company received no cars, but had orders for an average of 8 for each day. The record for August was 184 cars ordered and 83 furnished, a shortage of 101. On and between September 1 and 19, 1952, 72 cars were ordered and 56 were furnished.

The complainant employed a special representative with some 30 years' experience in traffic matters in this origin territory. He visited practically all communities in the territory, attended many meetings looking to the improvement of car supply, and worked closely with members of the complainant and lumber shippers in western Oregon during the car shortage of 1950. He found a large quantity of lumber being loaded from trucks into cars at Portland during the summer of 1950, which had been trucked from points local to the defendant's lines, some of them as far distant as Coos Bay, Oreg. Apparently the cars were furnished by carriers other than the defendant, although some were loaded from trucks at Park Street and at East Portland on tracks operated by the defendant and the Union Pacific Railroad Company.

It is urged by the complainant that the trackage and other facilities of the defendant are not adequate to meet the transportation needs of the area in western Oregon served only by its lines. It charges the defendant's management with failure to recognize important changes that have occurred in the lumber industry. During the last 15 to 20 years, the transition of the industry from western Washington to western Oregon has been marked, especially in recent years. Lumber shipments from Oregon originating on the lines of the defendant have increased by some 92,000 carloads, 1950 over 1938, or by 65.92 percent. In 1925, Washington produced almost twice as much lumber as that produced in Oregon; today the reverse is true.

Witnesses expert in the lumber business in Oregon expressed the opinion that production will continue to increase for many more years; that the yard tracks at Eugene are sometimes "jammed;" and that Roseburg is short of adequate storage tracks. It is practically conceded that the Brooklyn yard facilities at Portland have been so taxed at times as to cause serious delays. The complainant emphasizes that carrier facilities designed for conditions of 1930 do not meet the needs of the Oregon Lumber industry as it exists today.

This proceeding, although instituted by complaint, developed into a general investigation. Considerable evidence of record was obtained by employees of the Commissioner of Public Utilities of Oregon, intervener. These employee witnesses cooperated with the complainant and its counsel. It was not possible for the personnel of the intervener to survey traffic conditions on all lines of the defendant in Oregon, but efforts were concentrated on certain portions which seemed to con- **[541]** stitute "bottlenecks." The Oakridge-

Crescent Lake portion was characterized as "the cork in the bottle," and as having reached a saturation point in 1950.

Train sheets were checked for records of performance at Eugene, Portland, and Albany, Oreg. The testimony related principally to the operation of trains between Eugene and Crescent Lake and between Ashland, Oreg., and Black Butte, Calif. Operation over the mountains is considered a factor materially affecting the ability of the defendant to get empty cars into western Oregon, sometimes referred to as the valley, and loaded cars out. From his studies a witness for the intervener concluded that there is more traffic available on the defendant's lines in western Oregon than it is feasible to handle in existing operations over the Oakridge-Crescent Lake tracks. He strongly urged the use of the Portland gateway, and expressed the opinion that relief could come from an order by this Commission requiring the Oregon Electric and the defendant to interchange cars at such points as Albany or Eugene for loading at points as far south as Drain, Oreg., at the one-factor joint rates applicable over other routes. The record indicates, however, that the defendant could handle more traffic between Eugene and Portland, and the one-factor joint rates to the East are now applicable over that line via Portland. The witness suggested also that lumber shippers would be benefited, and the handling of Oregon lumber traffic could be facilitated, by enlarging the defendant's yards at Eugene, and by installing central traffic control and lengthening the passing tracks on the Eugene-Crescent Lake line.

In a number of instances cars furnished Oregon lumber shippers were undesirable for intended shipments. One shipper was given 44 undesirable cars out of 98 furnished in the month of July 1950; another was compelled to load cattle, refrigerator, and gondola cars; another had to accept cars

littered with debris from previous shipments; and others were furnished automobile cars limited to California destinations where the market was not always desirable.

The total number of carloads originated by the defendant in 1950 exceeded the number originated in 1940 by 327,000, an increase of 36.5 percent. During this period the number of cars owned by the defendant increased by 15,389, an increase of 41.2 percent, as compared with an increase of 4.7 percent for all class I railroads in the country. It is claimed, however, that this does not portray adequately the car-supply situation as it affects Oregon lumber. The defendant is said to have depended for many years for its car supply upon cars furnished by other lines. At numerous times during earlier years the number of cars on the defendant's line has been between 180 and 194 percent of the number owned by it, whereas in **[542]** more recent years, 1949 for example, the average was only 128 percent. The general superintendent of transportation of the defendant testified that the general adoption of the 5-day week has decreased the utility of freight cars to such an extent that it has displaced an estimated 5,197 of defendant's car supply. Using that figure, instead of an increase of 41 percent in car ownership in the last 10 years, the effective increase was only 27 percent. Another influence upon the defendant's car supply is the fact that the average length of haul of lumber products originating in Oregon has increased from 1,293 miles in 1940 to 1,598 miles in 1949 and 1,718 miles in 1951.

The use by the defendant of its 1940 ownership as a base of comparison is criticized because the ownership in that year is said to have been the lowest for a long period of years, having been only 85 percent of the 1937 ownership. This is largely the reason, according to the complainant, that during the war years 1941-45 the defendant had little

more than half enough cars to meet its traffic requirements. The complainant insists that the defendant was short some 19,000 cars in 1940. Attention is called to the defendant's evidence that the number of cars owned or leased in 1951 was 147.7 percent of that in 1940, and that with the improvement made in car equipment it could, in 1951, transport 155.6 percent of the 1940 tonnage. In the same period carloads of revenue freight originated increased 143 percent, and the number of tons increased 158 percent. The lumber and grain shippers here complaining, however, are interested principally in boxcars. The increase 1951 over 1940 in that class of equipment was 145.1 percent in number and 146.6 percent in carrying capacity. Forest products (excluding logs) originated by the defendant in Oregon during that period increased 183 percent in carloads and 209 percent in tons. It is claimed that some 7,700 more boxcars than were acquired by the defendant were needed for the increase in this traffic, and that 12,000 additional boxcars would have been required to keep pace with the 204-percent increase in the production of Douglas fir lumber in Oregon during the same period. This apparently assumes that the defendant would have transported all of this traffic, whereas some of it moved by water and some by motor carrier.

In 1950, some 82.5 percent of the defendant's traffic originated in Oregon consisted of forest products. Comparisons were made of revenue ton-miles and traffic originated per mile of road on lines of the defendant with national averages. On the revenue ton-mile showing, the complainant claims that the defendant was short in car ownership by several thousand cars. As to traffic originated per mile of line, the national average in 1950 was 145 cars in contrast with 150 for the defendant's system lines, and 215 on its Oregon lines. [543]

Shortage in adequate car ownership by the defendant, under fair and equitable distribution, would affect its ability to serve shippers over its entire system. A witness for the Oregon commissioner testified that the car shortage on the Portland division was acute from the week ended May 15 until the second week of November 1950. Weekly shortages after that first week exceeded 1,000 cars, averaging 2,864 cars during July, and reaching a high of 5,562 in late August. Somewhat comparable figures were presented by the general superintendent of transportation for the defendant. They show that an average shortage of some 1,352 cars existed on the Portland division. These data indicate that a severe shortage of cars was experienced on the Portland division some weeks before any shortage was indicated for the rest of the system. No overall system shortage is shown until the week ended June 17, 1950. The system shortage for that week appears as 831 cars, whereas the shortage for the Portland division is given as 1,497 cars. According to the complainant, the weekly average shortage on the Portland division was from two to three times that shown for the system. For example, for the weeks ended July 15, 22, and 29 a net system surplus of 303,421, and 95 cars appears, whereas the complainant indicates there was a shortage on the Portland division of 2,091, 2,793, and 2,884 cars, respectively.

The complainant asserts that the inadequate car supply was so distributed as to discriminate unjustly against the lumber shippers of western Oregon. An important factor in this respect is said to be the manner in which the cars available were allotted to the several western Oregon mills. Mills were given ratings by an official of the defendant at Portland. The so-called agents' 50 report was placed in use on the Portland division at the beginning of the car short-

age in 1950. At first it was compiled from information supplied by the defendant's agents. The official who prepared the agents' 50 report was subpenaed by the complainant. His testimony indicates that some of the mills were rated according to their cutting capacity, using 30,000 feet as a carload, and others were rated on their ability to load a given number of cars in an 8-hour period. The only reason he could give for this variance was that the information was furnished by the agents, and that some mills apparently were loading lumber which they did not cut. In 1951 the report was compiled on the basis of information furnished directly from the millowners. Changes in the agent's reports were made at various times as errors were discovered or as new information was received. The Oregon commissioner issued an order, effective on September 25, 1950, requiring the defendant to keep and preserve uniform records of all orders for cars, the orders to be written or confirmed in writing. That order was superseded by another which became effective on September 4, 1952. **[544]** and the latter was superseded by another, effective on June 27, 1953. The last order provides that car ratings for shippers of lumber shall be based on prior loading performance of each shipper, determined from a fair average of the highest loadings in 3 months of each of the 2 preceding calendar years, giving due consideration to new or changed facilities and present or anticipated shipments by water or motor carrier.

The complainant charges the defendant with unlawful acts in connection with car service, or the lack of it, in western Oregon which caused lumber shippers to suffer increases in transportation and marketing costs from curtailment in production that prevented deliveries on sale contracts for lumber and on sales in the open market, all

resulting in damage and loss of goodwill, for which the complainant alleges the defendant is liable. These allegations were made in the complaint for the benefit of any lumber shipper, member of the complainant committee, who might desire redress through an award of reparation. Only one, the partnership doing business as Wren Planing Mill, has asked reparation in this proceeding. Violation of sections 1 (4), 1 (11), and 3 (1) are specifically alleged by this complaint, and damages under sections 8 and 9 of the act are sought for the period June 1 to October 1, 1950. It is charged that during that period the defendant failed to furnish this shipper a reasonable car supply, and that it unlawfully discriminated against this shipper in that it failed to make an equitable distribution of the cars available on the Portland division. This claim is based principally on the alleged failure of the defendant to establish and enforce an equitable car distribution rule during this period of car shortage, said to be due largely to inconsistencies and variances in keeping records of cars ordered and supplied to this and other shippers.

Most Oregon lumber mills, including Wren, are dependent upon the defendant for an adequate car supply to keep their mills in operation. Storage facilities are limited. Without cars the storage space soon is filled and slowdown or shutdown in operation is forced. The claim is that the defendant, by failure to supply cars, prevented Wren from producing lumber which otherwise it could have produced and sold. Wren testified that there was no stoppage of work at its mill during the period June 1 to October 1, 1950, except for that made necessary by lack of cars. There was no recorded sawmill production for a period of 10 days from August 18 to August 29, 1950. However, during that time the defendant furnished Wren two cars, one on August 23 and one on

August 24. On August 14 Wren ordered 6 cars for placement on August 18; on August 19 6 cars were ordered for placement on August 21; and on August 24, 18 cars were ordered, 6 for each day of August 25, 26, and 28. This total of 30 cars ordered [545] for delivery during the 10-day period shows, according to the complainant, that the shutdown was due solely to the lack of cars.

Reference is made to reports of the Commission in which it has discussed methods for distribution of cars in periods of car shortages. In *Tanner & Co. v. Chicago, B. & Q. R. Co.*, 53 I. C. C. 401, 406, it is said:

> Thus, it is a common practice of carriers in periods of car shortage to distribute coal cars in accordance with mine ratings, determined by the volume of past shipments; but coal is shipped as mined and the amount that may be considered ready for shipment is the amount that can be mined, loaded, and forwarded from day to day. The best evidence of mine capacity is the volume of shipments during normal periods. * * *

Lumber produced at mills in western Oregon must be shipped largely as it is produced. The complainant stresses the fact that rating such a mill for cars based on production, as indicated in the quotation above, is not a proper measure because car shortages have existed in western Oregon during summer months since 1946, and ratings based on prior production would necessarily carry into effect the consequences of prior car shortages and serve to protect the defendant in its failure to furnish cars in subsequent periods of car shortage. Because of this, the complainant asserts that there has not been a period of normal movement of lumber from this origin territory that would show the true capacity of the lumber mills or the true market demand. It is argued, therefore, that the rules established in cases

determining quotas for the movement of wheat or coal would not be equitable if applied to western Oregon lumber. It is argued also that the consideration of damages suffered by Wren during the summer months of 1950 should not be limited to lumber on hand, nor to shipments made in prior years, as a basis for capacity, for the reason that prior operations and shipments are only as accurate a measure of Wren's capacity as the defendant's furnishing of cars in any period was equitable and complete. There being no period of equitable or complete car service for Wren, rules for distribution stated in prior reports of this Commission, it is urged, should not be considered as controlling here.

Rating for mills in the so-called agents' 50 reports gave Wren 4 cars on a stated production of 135,000 feet. This production figure is said to have been furnished the defendant by one of the partners of Wren. The rating later was raised to 5 cars, but the record is indefinite as to why such an increase was made. Wren claims that it was at the time producing more lumber; that it was and is shown in reliable publications relating to the Oregon lumber industry as having a capacity of 140,000 feet for its resaw mill and 200,000 feet for the planing mill; and that the proper official of the defendant was advised of this capac- [546] ity, which would warrant a quota or rating of 7 cars a day, but that the carrier-official could not remember having received such advice from Wren. Notwithstanding that reliable information was published by the defendant's freight traffic manager and in Crow's Buyers and Sellers Guides, such publications were not consulted nor used in making ratings for Wren or other mills on the Toledo branch of the defendant. At no time during the period covered by this report was Wren given a rating of more than 5 cars.

Reference is made to *Martin Bros. Box Co. v. Southern Pac. Co.*, 280 I. C. C. 395,[2] wherein division 3 dismissed a complaint against the defendant here which sought damages from losses of profit and goodwill due to alleged failure during the first 9 months of 1947, at the plant of the complainant at Oakland, Oreg., safe and adequate car service which it was claimed subjected the complainant to undue or unreasonable prejudice and disadvantage. Complainant argued that the instant record is more complete than that in the foregoing proceeding.

Wren asks an award of damages in the amount of $154,385.86. This total is made up of (1) loss of profits, $144,510.45, claimed as profits which could have been obtained from mill and planer operations if cars had been available for capacity operation and shipment, and (2) loss on sales of cants, $9,875.41. The computations appear to be based on capacity operation; that is, a production of 4,000,000 feet per month, or 16,000,000 feet for the reparation period, June to September 1950, both inclusive, which the witness for Wren termed "normal production," or the production in July and August 1948.

On June 1, 1950, Wren had on hand 285,358 feet of sawmill lumber and 77,919 feet of cants; on July 1, 543,733 and 182,766 feet, respectively; on August 1, 685,800 and 145,756 feet; on September 1, 1,165,768 and 480,798 feet; and on September 30, 1,408,033 and 560,784 feet. A witness for Wren presented at the hearing copies of a substantial number of car orders bearing dates in June, July, August, and September of 1950. Generally, they sought delivery or placement of 6 cars a day. On some there were notations indicat-

[2]Now on appeal from a final judgment of the District Court for the District of Oregon (Martin Bros. Box Co. v. United States, decided May 15, 1953), setting aside the order dismissing the complaint.

ing that 5 cars had been furnished on an order for 6; on some, the order-form notations indicated that 7 cars were furnished on an order for 6; on others there were no notations to indicate whether any cars had been furnished on a particular car order. The record indicates that there may have been other car orders on which Wren received cars during the period, but which the witness failed to bring to the hearing. The witness stated that Wren actually received 173 cars (of which 7 were stop- [547] overs) during the period June to September 1950, and that of 343 cars ordered during the period, Wren used 47 cars in October and 26 cars in November 1950.

Computations in support of Wren's claim for reparation were presented by a certified public accountant employed by Wren; they were reviewed by another certified public accountant employed by the defendant. From the latter's examination of Wren's records, it appears that of 350 cars ordered for spotting by Wren during the period June to September 1950, 197 cars were furnished. However, orders for 165 cars placed during the period were canceled. In the last 10 months of 1950, Wren ordered 557 cars, canceled orders for 245, and received 394, or 82 more than asked for on uncanceled orders. From this, the defendant argues that Wren was given a reasonable flow of empty cars for all the months during which it operated in 1950.

One of the partners, a principal witness for Wren, testified that the car-supply situation in 1951 for Wren was "very good." In that year, Wren ordered for daily placement from 1 car to 4 cars. During the months of June to September, inclusive, Wren ordered as many as 4 cars on each of 5 days; for the remainder of the period the daily orders were for 2 or 3 cars. From this and the large cancellation of car orders made in September and October 1950, the defend-

ant argues that orders of 6 cars per day during the summer period of 1950 were inflated and excessive. The number of feet of lumber shipped by Wren, by months for 1950 and 1951 are shown as follows:

MONTH	1951	1950	MONTH	1951	1950
January	666,586	0	July	1,503,143	1,722,566
February	83,119	0	August	1,448,938	1,573,728
March	110,038	1,001,061	September	1,141,352	1,626,028
April	60,482	1,207,061	October	1,551,318	1,723,706
May	490,896	1,429,970	November	462,685	816,694
June	1,293,778	2,269,640	December	473,900	608,145
			Total	9,286,241	13,978,599

Wren's profits exceeded $118,500 for 1948, $105,500 for 1949, and approximated $94,500 for 1950. The stated production capacity of 16 million feet of lumber and cants, used as the basis for the reparation sought, assumes that Wren would have operated at full capacity during the 103 working days in June through September 1950, with small or no margin for normal work stoppages due to injuries to employees, equipment breakdown, or other hindrance. The estimates for the 4-month period also assume that the prevailing prices for lumber would have remained in effect if Wren and all the other western Oregon mills had enjoyed a 100-percent car supply during the period.

Wren was entitled to just, reasonable, and nondiscriminatory car [548] service. However, there is no absolute right of cars for any shipper, and the carrier is liable in damages only if it fails to render a just and reasonable service. In *Midland Valley R. Co. v. Barkley*, 276 U.S. 482, 484-485, the Supreme Court said:

> The right of a shipper to cars is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in

full. The law exacts only what is reasonable from such carriers.

There were car shortages severe in nature on the Portland division of defendant's lines during the summer seasons of 1946 to 1950, inclusive. From the showing made of record, there is no ground for the assumption that Wren or any other of the 436 mills on the Portland division reasonably might have expected sufficient cars for maximum lumber-capacity production and, in addition, for lumber purchases during the summer months of 1950.

On the issue of discrimination, it is clear that Wren did not receive as many cars in the summer of 1950 as he desired, but neither did other mills on the Portland division. Wren was diligent in his efforts to obtain cars; so were other shippers in the territory, and some of them expended greater efforts to obtain cars than did Wren. There is some evidence that Wren did not receive cars in as close a ratio to capacity production as did other mills on the division during the time. This, the complainant asserts, was due to the method used in allotting cars to the mills on a quota, or rated, basis. A rating was assigned to Wren based on information furnished by it, as was done generally in the case of other mills, and these ratings were revised from time to time. In one such revision the rating for Wren was increased from 4 to 5 cars a day. Wren claims the rating should have been changed to 7 cars a day, and it is claimed that the proper official of the defendant was furnished information which warranted that rating. The official testified that he had no recollection of having received any such information. The official is criticized for not having used information furnished by the traffic manager of the defendant and also official publications relating to the lumber industry in Oregon in assigning ratings. It appears, however, that the same method was followed in assigning quotas

or ratings for all mills on the Portland division, and apparently the results were unsatisfactory to all shippers who testified of record. The evidence falls short of establishing that Wren fared any worse, as a whole, under the quota system used than did the other shippers on the Portland division.

A careful study of the evidence bearing on the issue of damages to Wren is convincing also that it lacks sufficient definiteness to support an award of reparation. There is no convincing proof, if Wren had [549] obtained all of the cars ordered, that it could have made any particular number of additional shipments, nor, if additional shipments had been made, what specific profits thereon could have been expected. In cases of this character, where special damages are sought, the proof thereof must be as definite and certain as would be necessary to support a judgment in court. *American Trading Corp. v. Seaboard Air Line Ry. Co.*, 201 I. C. C. 440,443; *Lignum-Vitae Products Corp. v. Alabama G. S. R. Co.*, 268 I. C. C. 599, 608. The evidence before us fails to meet this test.

With respect to the alleged inadequacy of facilities and service, the defendant emphasizes that the number of carloads originated and terminated by it in Oregon was greater by 47,000 in 1951 than in 1950. Of these, 15,635 cars consisted of lumber and forest products. The increase in the volume of lumber and forest products carried was 619,400 tons. As to the operation of freight trains, there were 1,672 westbound in the period April to October 1950 between Eugene and Crescent Lake as compared with 1,747 in the same period in 1951. In recent years the defendant has substantially increased its fleet of diesel locomotives and switchers, completed new retarder yards at Roseville and Los Angeles, Calif., increased its traffic density and freight-

train speed, installed centralized traffic control on several portions of its lines in California, and planned such control on the lines between Crescent Lake and Klamath Falls. Also, at the time of the hearing the defendant had well under way a study of its several subdivisions of lines in Oregon, with a view to the installation of centralized traffic control thereon, including the Portland division, the Springfield subdivision, and the Shasta division. Installation of such control between Eugene and Crescent Lake was in progress at the time of the oral argument herein. By the end of 1954 it is expected that it will be completed between Eugene and Klamath Falls, a distance of 195 miles.

There are not enough cars made empty in Oregon nor in California, north of San Francisco, to satisfy demands for empty cars for loading in those areas. It is thus necessary for the defendant to move empty cars from the area around Los Angeles and from as far distant as Texas and Louisiana. A number of cars are received from the defendant's connections at Ogden, Utah. The necessity of bringing empties from such distant areas and over routes with such difficult operating conditions as that via Tehachapi, Calif., increases the hazards likely to restrict or stop the flow of cars to the Oregon territory.

The lack of facilities and the operation on the Siskiyou line between Ashland, Oreg., and Hornbrook, Calif., was criticized by witness for the Oregon commissioner. Prior to 1926 the Siskiyou line was the defendant's only entrance into Oregon. In June 1926 it carried 32½ [550] trains per day. Inauguration of service over the Cascade line through Klamath Falls diverted traffic from the Siskiyou line so that in 1952 the average movement over the latter was 8.2 trains per day. The capacity of that line is the same now as in 1926. It now handles about 30 percent of the empty cars brought

into Oregon. In 1926, locomotives operated over that line into Oregon had a rating of 645 tons; the locomotives now used to serve Oregon are for the most part diesels with a rating of 2,450 tons. With the Cascade line in service, western Oregon is now given about 11 times more train service than in 1926. Carloads originating on the defendant's lines in Oregon have increased 170 percent, and tons originated have increased 200 percent, 1951 over 1926. More than $630,000,000, was spent by the defendant in the last 20 years for additions and betterments to its property and for locomotives and cars, of which about $375,000,000 was expended in the last 6 years.

The defendant asserts that the car shortages which occurred during the summer of 1947 to 1950, inclusive, were the only severe peacetime shortages on its lines since 1923. Large surpluses of empty cars occurred in the period 1924 to late 1940. For example, in 1939 the defendant had on its lines an average daily surplus of 6,632 serviceable cars, and in 1940 the average was 5,374. That period was followed by an upsurge in traffic volume as a result of World War II, during which the defendant had difficulty in disposing of cars made empty on its lines. With the end of the war, the situation suddenly changed and there was a car shortage until a decline in industrial production and in railroad traffic occurred in 1949. Shortly thereafter there followed an upsurge in traffic caused by the Korean conflict, so that the national traffic situation changed from a reported car surplus of some 35,000 to one of car shortages that became widespread and severe in many parts of the country, particularly in western Oregon. Moreover, the effect of the 5-day week, in terms of car shortage was to reduce the Nation's car supply by about 175,000 cars. These car shortages, national in scope, were discussed in the 64th and 65th annual reports

of this Commission to the Congress, and included the period covered by the complaint herein.

As a contributing factor to the defendant's difficulty in furnishing cars to its shippers during this period, the Association of American Railroads issued several car service orders or directives requiring the defendant to turn over to its connecting lines specified numbers of serviceable cars as described in the orders. Seven such orders were issued in 1946, 4 in 1948, 3 in 1949, 10 in 1950, and 7 in 1951. Four of these were still in effect in December 1950. Illustrative of the orders made effective during 1950 was one requiring the defendant to deliver to the Atchison, Topeka and Santa Fe Railway Com- **[551]** pany, called the Santa Fe, 500 plain boxcars suitable for merchandise loading at the rate of 50 cars daily. This order took effect on May 21, 1950, and was canceled on June 10, 1950. On June 1 it was modified so as to exclude Santa Fe plain boxcars from all distribution and loading, except in the State of Oregon, and requiring the return of such cars empty to their owners. Another order, effective on July 7, 1950, and canceled on August 3, 1950, required the defendant to withdraw from distribution and return to owners all boxcars owned by The Western Pacific Railroad Company then located in California and Nevada. This order was superseded by another, effective July 10, which directed the defendant to deliver 50 empty serviceable plain boxcars daily to the Western Pacific for a 10-day period. Effective on July 16, 1950, another order required the defendant to deliver to the Union Pacific Railroad Company at southern California junctions, 50 serviceable plain boxcars daily, not including Canadian boxcars or cars routed home to owners at junctions where made empty. The order was amended on August 2 so as to increase the requirements to 125 cars daily, and again amended on August

17 to increase the demands to 200 cars daily. These orders aggravated the car-supply situation for the defendant at a time when it could not supply its own shipper demand.

During World War II the purchase of cars, locomotives, and many other materials were restricted by priorities. In the period 1940 to 1951 the defendant purchased 48,813 freight cars and 725 locomotives. Some 454 of the latter were diesels. Since 1946 the defendant has purchased some 30,680 cars, at a cost of approximately $380,000,000, and contributed some $79,000,000 for the purchase of refrigerator cars for the Pacific Fruit Express, in which the defendant has a half interest. Delays were experienced in the delivery of some of the equipment. Bad-order cars have been repaired with diligence. The defendant insists that it has done all within its power to serve its shippers.

Reference is made to an agreement reached by the railroads in July 1951 at Chicago, Ill., the principal points of which were to increase car ownership to 1,727,873 cars as of July 1, 1950, an increase of 122,000 cars; reduce bad-order cars to 5 percent of the ownership of each class of car on the road; speed up car handling so as to attain an average of 50 miles per freight car per day; avoid delays and other insufficiencies in freight car handling; and solicit shipper-receiver cooperation in freight-car efficiency.

The defendant, in recent years, has had on order numbers of cars much above the average for class I railroads. In carrying out the Chicago agreement, it has far exceeded the efficiency in operation there contemplated. In 1950, the defendant was moving freight cars more than 65 miles per day, and for all serviceable cars, 68 miles. [552] Unserviceable cars on all class I railroads were about twice the percentage of that on the system lines of the defendant. For the period 1946 to 1951, the defendant exceeded the national average in additions to equipment.

General discussion and conclusions.—The production of lumber in western Oregon has been increasing steadily for a number of years, and in recent years the increase has been accelerated. This is an important factor in the car-supply situation complained of. While the defendant has not furnished all the cars desired by Oregon lumber shippers during the peak season in summer months, on an annual basis the cars furnished have approximated, and in some instances exceeded, those ordered by the shippers. While it may be that the defendant should have anticipated additional equipment needs earlier than it did, it may not be overlooked that no one could foretell with certainty the increased traffic demands made after World War II nor the handicaps experienced with governmental priorities in obtaining delivery on orders for new equipment. As stated, the car shortages in the periods complained of were largely national in scope, and there is no convincing evidence that, on the whole, the complainant's members did not fare as well in the car service accorded them as did shippers generally in car-shortage areas elsewhere. In these circumstances, the record would not support a finding that the defendant is guilty of unreasonable laxity in meeting the great and largely unexpected demands made upon it in the periods referred to.

With respect to the present facilities and service of the defendant, the additional cars and diesels purchased, the improved facilities, and the increased operating efficiency in recent years, together with improved car distribution which should result from compliance with the order of the Oregon commissioner, effective June 27, 1953, may reasonably be expected to insure adequate car supply and service, and equitable car distribution, to the complainant's members in the future. However, should inequitable car distribution

develop on any of the defendant's divisions, application should be made promptly to the Commission for relief, when consideration will be given to the issuance of a car service order requiring the defendant to distribute the available cars in an equitable manner.

We conclude that the record fails to establish that the defendant failed to provide transportation upon reasonable request therefor, or failed to furnish adequate car service within the limits of its capacity, or subjected any of the complainant's members to undue or unreasonable prejudice or disadvantage, as alleged. The complaint will be dismissed.

[553]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 141

SHIPPERS' CAR SUPPLY COMMITTEE, an Oregon Corporation,

Appellant,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Appellees,

and

SOUTHERN PACIFIC COMPANY,

Intervening Defendant Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM THE STATE OF OREGON AMICUS CURIAE

On Appeal from the United States District Court for the District of Oregon

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APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM THE STATE OF OREGON AMICUS CURIAE

On Appeal from the United States District Court for the District of Oregon

A motion to affirm has been filed on behalf of the Interstate Commerce Commission and United States. A separate and similar motion has been filed by Southern Pacific Company. In effect, these motions contend that certain findings referred to or quoted from the Order of the Commission are sufficient to sustain the Commission's ultimate conclusions.

The Question Presented Is Substantial

Appellants could probably have forestalled the motions by following the usual procedure of bringing up the entire transcript of evidence. Indeed, it was not without some rather agonized inner-searchings that appellant elected to bring the matter to this Court in simple form, based solely on the inadequacy of the Commission's report to support its conclusions.

In this instance, appellant has chosen the simplest possible approach to this Court. That the question is limited, however, by no means portends that its answer lacks substance and importance.

As shown by the Commission's report, this proceeding before the Commission was one of far greater scope than the usual discrimination case. An appendix to the original complaint filed with the Commission shows some 93 business firms as members of the appellant Shippers' Car Supply Committee. The proceeding developed into a general investigation, with intervention by the Oregon Public Utility Commissioner. Substantial evidence was introduced by that public agency (p. 17, Motion to Affirm of the Commission and United States). [1]

We have elected to present this appeal in limited form. We are satisfied with that choice. Our only concern is that we not be denied our day in court because of our departure from the more customary (and more complicated) appellate tactics. The simplicity of the approach should not militate against the importance and gravity of the questions presented.

The issue is, in fact, a limited one, and the nature

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[1] For purposes of brevity and consistency in this brief, our page references to the Commission's Report will be to the pagination in the appendix to the motion to affirm filed on behalf of the United States and Interstate Commerce Commission. The report of the Commission is likewise appended to the motion filed on behalf of Southern Pacific Company.

of the motions to affirm tempt one to forget that this is purely preliminary and not a matter upon which appellant is expected to file a complete brief upon the merits.

Contents of the Commission's Report

The Report of the Commission, after brief introductory recitals, proceeds through some 11 pages devoted almost wholly to recitals and subsidiary findings indicating that appellant presented a strong and convincing case before the Commission. (pp. 12 through 22). After some 8 pages (23 to 30) devoted to the damage claim of Wren, (not involved in this appeal) the Order concludes with 6 pages (31 to 36) from which the Commission and Southern Pacific in their motions seek to draw support for the conclusions reached by the Commission.

The language relied upon is quoted in some detail at pages 6 to 8 of the Commission's motion. For purposes of brevity we adopt the summary used by Southern Pacific at pages 12 and 13 of that company's Motion to Affirm, with some capsulizing so as to conveniently outline the findings of fact upon which the attacked conclusions of the Commission must rest:

1. The Oregon car shortages were regional manifestations of car shortages national in scope which occurred at approximately the same periods. (p. 12, Southern Pacific Motion).
2. Oregon shortages were largely the result of unprecedented expansion of the lumber industry at a time the railroads were striving to improve transportation facilities after years of depression and war. (p. 13, Southern Pacific Motion).
3. Southern Pacific Company surpassed the performance of the nation's railroads as a whole in augmenting equipment and improving efficiency. (p. 13).

4. Southern Pacific was handicapped in its efforts to alleviate the Western Oregon car shortages because Oregon is a deficit state, where the demand for empty cars substantially exceeds the number of loaded cars moved into the state and made empty there. Cars have to be brought to Oregon from great distances. (p. 13).

5. Southern Pacific was hindered in meeting Oregon's demands by car service orders (of the Association of American Railroads) requiring it to turn over large quantities of empty cars to connecting lines. (p. 13).

The Issue of Discrimination

Clearly it would not be proper nor feasible for appellants to argue this matter on the merits at this time. We have raised in our opening statement of jurisdiction what we sincerely feel are substantial questions concerning the validity of the order involved. It is no answer to these points to urge that the Commission's order is presumptively valid and that its findings of fact are presumptively sound, propositions with which no one disagrees. Our basic point is that having made findings of fact which presumptively are valid, the Commission stated ultimate findings and conclusions contrary thereto and wholly arbitrary and entered its order accordingly. This defect in the order may most clearly be illustrated by discussion of the findings and conclusions relating to the issue of discrimination. At page 8 of our opening statement of jurisdiction, this issue was stated as follows:

"3. Causing undue and unreasonable prejudice and disadvantage to complainant's members by failure to provide car service to them in the same proportion to actual requirements as were provided to other

shippers on its lines in Oregon and elsewhere, contrary to section 3(1) of the act.

4. Causing undue and unreasonable prejudice and disadvantage to shippers generally on its lines in Oregon and giving undue and unreasonable preference and advantage to other shippers on its lines in other states, in violation of Section 3(1) of the act."

We do not intend, of course, in discussing this question, to waive any part of the presentation contained in our opening statement of jurisdiction. Our purpose is to illustrate that feature of the case which may with the greatest brevity and clarity be used to illustrate the defects in the order which we feel justify this Court in noting probable jurisdiction.

The Law

The applicable statute upon which the above allegations of discrimination were rested is 49 U.S.C. Sec. 3(1) which provides:

"It shall be unlawful for any common carrier subject to the provisions of this Part, to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; provided, however, that this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The Commission's Detailed Findings Showing Discrimination

The pivotal findings on the discrimination question appear at page 21 of the order:

> "Shortage in adequate car ownership by the defendant under fair and equitable distribution, would affect its ability to serve shippers over the entire system. A witness for the Oregon Commissioner testified that the car shortage on the Portland division was acute from the week ended May 15 until the second week of November 1950. Weekly shortages after that first week exceeded 1000 cars, averaging 2,864 cars during July, and reaching a high of 5,562 in late August. Somewhat comparable figures were presented by the General Superintendent of Transportation for the defendant. They show that an average shortage of some 1,352 cars existed on the Portland division. These data indicate that a severe shortage of cars was experienced on the Portland division some weeks before any shortage was indicated for the rest of the system. No over-all system shortage is shown until the week ended June 17, 1950. The system shortage for that week appears as 831 cars, whereas the shortage for the Portland division is given as 1,497 cars. According to the complainant, the weekly average shortage on the Portland division was from two to three times that shown for the system. For example, for the weeks ended July 15, 22, and 29 a net system surplus of 303,421, and 95 cars appears, whereas according to the complainant in the case there was a shortage on the Portland division of 2,091, 2,793 and 2,284 cars, respectively." (p. 21, Appendix to Commission's Motion).

Note that the Commission has found that comparable figures were presented by Southern Pacific itself. This is more than mere comment on the evidence. And this, if the Court please, was in 1950. This Oregon situation did not result from a new and surprising demand (*Mid-*

land Valley R. Co. v. Barclay, 276 U.S. 482) but after strenuous objections and protests from Oregon shippers beginning in 1946, including contacts with the Association of American Railroads and Interstate Commerce Commission. (p. 13, Appendix). The factual situation quoted above from the Commission's Report was the situation during the *fifth* year of the recurrent car shortage. The Oregon branch of Southern Pacific not only had a shortage a month before the Southern Pacific system showed an over-all shortage, but whenever an over-all system car shortage did appear in the figures, the system figure was only a fraction of the Oregon shortage. The average Oregon shortage of cars for the whole period of 1950 was two to three times the Southern Pacific system shortage—which means that with Oregon excluded, the situation for Southern Pacific was one of net surplus.

Thus, for the week of June 17, 1950, the figures were:

Car shortage, Southern Pacific system—831 cars
Shortage, Southern Pacific in Oregon—1,497 cars
Difference, net system surplus of cars, Oregon excluded—666 cars.

A month later, in the middle of July, the disparity was even worse. While this situation existed, some shippers trucked lumber from great distances, into Portland where cars were available (p. 16, Appendix) or, by preference or necessity, other shippers went into Washington and obtained so-called "Stop" cars which were partially loaded in Washington and then routed through Oregon to complete loading. (p. 14, Appendix).

Analysis of Findings Relied upon by Appellees to Sustain the Commission's Ultimate Findings and Conclusions Relating to Discrimination

As we have suggested, the primary thrust of our argument is that the ultimate findings and conclusions en-

tered by the Commission are arbitrary and capricious in that they are inconsistent with the underlying findings and recitals contained in the order.

Southern Pacific, as above noted, has outlined five findings which it suggests support the ultimate determinations of the Commission that, among other things, no unjust discrimination was in fact being practiced as alleged in the complaint. Let us test the findings suggested to determine whether substantial question as to their validity exists sufficient to justify this Court in noting probable jurisdiction herein.

Finding No. 1 states in substance that a national shortage of cars existed during the relevant period of time and that the shortages in Oregon were regional manifestations of a national situation. The defects in this finding are patent. There was no similarity in the pattern of the national car shortage and that on Southern Pacific's Oregon operations. As far as Southern Pacific was concerned, it had a shortage on its Oregon operations and a surplus elsewhere. There is, moreover, no legally sufficient causal relationship between the national car shortage and the Oregon car shortage here alleged to be discriminatory because of the intervening discretionary control over the distribution of cars on a system basis exercised by the Southern Pacific Company. We do not dispute the fact that a national shortage of cars existed. Our point is that this record does not justify a conclusion that this condition caused or in any way directly influenced the internal system car distribution practices of Southern Pacific Company. The issue of discrimination aims at what Southern Pacific did with such cars as it had available for distribution, not at how many cars it provided for service on its system, whether the total number was adequate or not.

Finding No. 2 suggests in substance that the Oregon

car shortages resulted from an unprecedented expansion of the lumber industry at a time when Southern Pacific was striving to bring its facilities up to standard after years of depression and war. The same criticism as above indicated is applicable here, namely, there is no relationship between Southern Pacific's over-all system shortage of cars and facilities and the method by which such cars and facilities which are available are distributed or allocated. We are concerned here with whether Southern Pacific practiced unjust discrimination in the allocation of cars available to it, not with whether considered as a whole inadequate facilities were available generally. This finding will not support the ultimate conclusions relating to discrimination.

Finding No. 3 is closely inter-related with Finding No. 2 and is subject to the same comment. Southern Pacific indisputably made heavy investments in equipment and facilities during the period involved, comparatively greater outlays than the nation's railroads as a whole. But this will not support a rational conclusion that the facilities and cars produced by the expenditures were distributed on a non-discriminatory basis or that a fair and equitable proportion of such expenditures and cars were allocated to Oregon. One might just as well conclude that as long as Southern Pacific expended funds at a rate greater than the average of the other railroads serving the nation, that it could not be guilty of discrimination between its various service areas while so doing. The non sequitur is transparent.

Finding No. 4 does nothing more than re-state the problem without suggesting an answer. Concededly Oregon is a deficit state and concededly this condition existed long prior to 1950. If there had been no shortages prior to 1950, the facts of record logically might have justified affording Southern Pacific a reasonable time

within which to adjust to the demand. But would this be justification for shortages which continued unabated for months while Southern Pacific had a system surplus? Would such be an adequate excuse for stifling discriminations found to exist five years after the condition first was detected? (*Pennsylvania R. Co. v. Sonman S. C. Co.*, 242 U.S. 120, 127). That Oregon is a deficit state might well indicate reluctance on the part of the Southern Pacific Company to deadhead adequate cars into the state and might support the conclusion that the shipping demands of the lumber industry create uneconomic conditions in the return of cars, but it cannot form a rational basis for the conclusion that what Southern Pacific did with those cars it had available was non-discriminatory as to Oregon shippers in relation to other shippers on Southern Pacific's lines. No amount of sophistication in terming these findings of the Commission to be discretionary, presumptively reasonable, or peculiarly relating to the Commission's expertise will gainsay the fact that elementary rules of logic have been violated and arbitrary conclusions stated. If the conclusion is capricious it matters not whether it be discretionary, presumptively reasonable or the product of expert judgment. Illogic is illogic, no matter what its dress.

The same may be said with equal force with regard to Finding No. 5. It may be admitted that Southern Pacific had difficulty in meeting the demands of its system for cars by reason of the distribution rules established by the Association of American Railroads. The fact is that even operating under these car distribution rules Southern Pacific continued to show an average system surplus of cars during most of the time relevant hereto and, despite turning over cars to other lines, was left with an average number of cars on its lines in excess of ownership. (p. 19). Nothing in this, however, will

support or even suggest the conclusion that what Southern Pacific did with such cars as it had available was equitable and non-discriminatory as to Oregon shippers.

In concluding this portion of our brief, we repeat that the discrimination issue cannot properly be resolved by findings that a national car shortage existed, that unprecedented expansions in the lumber industry occasioned a heavy demand for cars, that Southern Pacific's general system-wide equipment and facilities expenditures were commendably heavier than those of the nation's railroads as a whole, that fewer cars return to Oregon loaded than leave the state loaded, that Southern Pacific was operating under A.A.R. rules relating to the distribution of cars. The issue is whether Southern Pacific Company distributed the cars it had available on an equitable and non-discriminatory basis as to Oregon shippers. In resolving this issue, the above findings are relevant only to the extent that they may be shown to have had a rational causal connection with the actual car distribution practices engaged in by Southern Pacific. We submit that no such connection exists, that such a connection is essential to the validity of the order, and that the order, for want thereof, is arbitrary and capricious. *Interstate Commerce Comm. v. Louisville & N.R. Co.*, 227 U.S. 88, 91.

The Basis for the Commission's Conclusion as Stated by the Commission

As is apparent, none of the foregoing findings will sustain the conclusions reached by the Commission. Indeed, the Commission itself did not rest its order solely thereon. Apparently the Commission intended to rest the order also on the following language:

> ". . . there is no convincing evidence that, on the whole, the complainant's members did not fare

as well in the car service accorded them as did shippers generally in car-shortage areas elsewhere," (p. 35, 36).

This statement is a transparent evasion of the issue, is wholly arbitrary and inconsistent with earlier findings made. It was not incumbent upon complainants to demonstrate discrimination in comparison with the nation at large but only that discrimination had been practiced by defendant Southern Pacific Company in its treatment of Oregon shippers in relation to other areas *on its lines*. The record clearly establishes that Oregon over a long period of time bore not only the entire brunt of the shortage in cars existing on Southern Pacific's lines but during most of the time indeed was severely short of cars during periods when the remainder of the Southern Pacific Company's system had *an excess of cars*. On this point see *United States v. Berwind-White Coal Mining Company*, 274 U.S. 564, 583.

Commission's Findings of Fact Based on Evidence Beyond the Record

We direct the Court's attention to two additional findings which appear in the Commission's report. The Commission found:

1. Improved car distribution should result from compliance with the order of the Oregon Commissioner, *effective June 27, 1953*, which "may reasonably be expected to insure . . . . equitable car distribution to the complainant's members in the future." (p. 36, Emphasis supplied.)
2. Installation of centralized traffic control between Eugene and Crescent Lake was "in progress at the time of oral argument herein." (p. 31).

These matters were brought to the attention of the Commission by Southern Pacific outside the record. The

Commission, nevertheless, has included them in its order and it is apparent that the order in important respects rests upon these recitals of fact. We suggest to the Court that if what has been said before in this brief is not adequate to persuade the Court to note probable jurisdiction, that this element in the case is sufficient justification therefor by reason of the patent prostitution therein not only of the Administrative Procedures Act but of elementary concepts of due process and fair play.

The Controversy is not Moot

The preceding portion of this brief is a sufficient answer to the Motion of the Commission and the United States. Southern Pacific raises one additional point by erroneously advising this Court that the District Court "concluded that the controversy before it was moot". (Southern Pacific Motion pp. 18 and 21).

In fact, the only issue found to be moot by the District Court was with respect to facts arising after the record in the case was closed, which facts were injected by Southern Pacific and not by appellant.

By a motion directed to the District Court, Southern Pacific erected a windmill at which to tilt.

Appellant's petition to the District Court for an injunction against the Order of the Commission attacked numerous deficiencies in that order for failure to find that Southern Pacific had violated the law and discriminated against Western Oregon shippers in the matter of cars, facilities, interchange arrangements, and adequate personnel—all, of course, pertaining to the complaint period and based upon evidence in the record. A prayer to the Commission that Southern Pacific be enjoined from continuing its discriminatory practices was clearly proper. Yet, it was upon this point which Southern Pacific raised the issue of mootness before the District

Court. Summary judgment was moved for upon the following grounds:

> "1. The denial by the Commission of reparations cannot be reviewed by this three judge court and the only issue before this Court is whether petitioners, on the record made in 1951 and 1952, are entitled to relief for the future. The requested relief for the future is predicated upon the alleged inadequacy and discrimination in transportation service asserted to exist in 1951 and 1952. The affidavit of W. D. Lamprecht, General Manager of Southern Pacific Company (Exhibit "A" of intervening defendant's memorandum of points and authorities) shows that the facts existing at the time the record was made before the Commission in 1951 and 1952 have materially changed. The issues presented by the record concerning future relief have been rendered moot by these changes in the operation of Southern Pacific Company. No justiciable controversy is here presented." (Motion of Intervening defendant Southern Pacific Company, pp 2, 3, a part of the transcript on this appeal).

Bluntly, what Southern Pacific tried to do before the District Court was to present, by way of affidavit, facts arising after the complaint period to show that many improvements in service to Western Oregon had been inaugurated, and that Southern Pacific, voluntarily, had provided much of the relief for which appellant had sought (and been denied) a Commission Order. The list of improvements in service to Western Oregon presented to the District Court, arising after the complaint period. was imposing, and is indicative that Southern Pacific was more impressed by the case made before the Commission than was the Commission itself.

Southern Pacific, again by its motion to affirm directed to this Court, offers the advice:

> "That substantially all of what was sought by the

1950 complaint has, in the course of progress over the intervening years, been accomplished." (p. 21)

This is another instance of the exasperating practice indulged in by Southern Pacific of bringing the Commission and courts "up to date" and attempting to influence the decision by matters dehors the record.

The District Court held that in determining whether or not the Findings and Order of the Commission should be upheld:

> "We must look to the record made before the Examiner for the Commission in the light of the facts existing prior to September 26th, 1952." (District Court Opinion, p. 11, Statement of Jurisdiction).

All this appellant ever sought before the Commission or the District Court was an appropriate Order based upon the facts of record. We think it is well established that intervener's argument of mootness based upon subsequent improvements in service is wholly irrelevant. *Southern P. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498; *United States v. Trans-Missouri Freight Asso.*, 166 U.S. 290, 308; *Panama Refining Co. v. Ryan*, 293 U.S. 388; *Federal Trade Com. v. Goodyear Tire & R. Co.*, 304 U.S. 257; *Walling v. Reuter, Inc.*, 321 U.S. 671; *Ford Motor Co. v. United States*, 335 U.S. 303; *Yarnell v. Hillsboro Packing Co.*, (C.C.A. 5, 1934) 70 F(2d) 435, 438; *Walling v. Haile Gold Mines* (C.C.A. 4, 1943) 136 F(2d) 102, 105.

The leading case is *Southern P. Terminal Co. v. Interstate Commerce Commission*, cited first above, but perhaps the best concise statement occurs in the last cited Circuit Court decision, *Walling v. Haile Gold Mines*, 136 F(2d) 102, at page 105:

> "It is familiar law that the discontinuance of an illegal practice by defendant (either by going out of

business or otherwise) after the institution of legal proceedings against the defendant by a public agency, does not render the controversy moot. (Citing Cases). This particularly is true where the challenged practices are capable of repetition. (Citing Cases). Nor is a case rendered moot where there is a need for the determination of a question of law to serve as a guide for the public agency which may be called upon to act again in the same matter."

To use a rather homely illustration, and one which we think is justified by our own factual situation, assume that Doe seeks an injunction against Roe, an adjoining land owner, from draining his sewage onto Doe's land. Roe answers denying the fact of drainage and the trial court finds for Roe on the facts—there is no sewage drainage. Doe appeals, and before the case is heard by the Appellate Court, Roe digs a ditch and diverts the sewage so it no longer drains on Doe's land. Roe then responds to the appeal by arguing (1) the lower court was right on the facts—I didn't do it, and (2) since the lower court's decision I have constructed a drainage ditch so the sewage does not drain that way any more, so there is nothing for the court to decide—the issue is moot.

Assuming that this is a true Appellate Court, it appears that Roe should not be permitted to bring in new facts upon the appeal. Further, it is just possible that Doe may want his injunction anyhow, to have his rights determined, rather than having to depend upon the continued good faith of Roe, who still maintains that he did nothing wrong in the first place.

As shown by the Commission's Report and Order, Southern Pacific service to Western Oregon was such as to work considerable economic hardship on a great many industries recurrently over a period of some 7 years,

from 1946 through 1952. The Report also shows that despite strenuous efforts, some directed to the Commission itself, by the affected industries, the situation worsened rather than improved until this complaint was brought. More than a matter of principle is involved. Appellant is not hesitant to commend Southern Pacific for substantial improvement in its service to Western Oregon since the proceeding was terminated before the Commission. Whether the improvements satisfy the complaint of appellant was an issue raised by Southern Pacific and rejected by the District Court. It is not an issue before this Court. The only issue is the sufficiency of the facts found by the Commission to sustain its Order. If the Order is legally wrong it should be set aside. Shippers are entitled to have their rights determined by the Interstate Commerce Commission and not by the whim of the carrier.

The Interstate Commerce Commission is more than a nominal defendant in this proceeding. In a very real sense appellant's complaint to the District Court was directed at what the appellant believes is an unconscionable abdication of its statutory duties by the Commission.

As shown by the Commission's Report, several witnesses for the appellant gave strong testimony that no permanent solution to the rail transportation problem in Western Oregon would ever be arrived at until the Portland gateway is opened to substantial lumber traffic during periods of car shortage, thus making available transcontinental roads of the more northerly carriers and eliminating to some extent the necessity of bringing empty cars from distant southern points when shortages develop. (Appendix to Commission's Motion, p. 18). Of course it is not the function of this Court to direct the opening of the Portland gateway in times of car shortages, or to direct any other specific solution, but appel-

lant may yet hope that once the Commission is required to assume and give meaning to the duties enjoined by the Interstate Commerce Act, relief will be afforded, even beyond that voluntarily provided by Southern Pacific since the record of this case was closed.

There is one other reason that this controversy is not moot. The damage claim of Wren, the only member of the appellant which filed such a claim, is pending in District Court. The damages in that proceeding are alleged to arise both from the general discrimination which Wren suffered along with many other shippers, and from discrimination peculiar to the Wren operation. No one supposes that the District Court, relying upon the identical record, is going to make a separate determination upon the issue of general discrimination. The District Court will be governed by the decision of this Court in that respect.

CONCLUSION

For the foregoing reasons, we respectfully submit that substantial questions are presented by this appeal and probable jurisdiction should be noted.

Respectfully submitted,

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